# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1900.**

No. ~~148~~ 175.

BANK OF IRON GATE, PLAINTIFF IN ERROR,

*vs.*

JAMES D. BRADY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

**FILED OCTOBER 17, 1900.**

(17,933.)

21117

# (17,933.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1900.

No. 448

---

BANK OF IRON GATE, PLAINTIFF IN ERROR,

*vs.*

JAMES D. BRADY.

---

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

---

INDEX.




JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1900.

1 The United States of America, } ss:
Eastern District of Virginia, }

At a circuit court of the United States for the eastern district of Virginia, begun and held at the court-house, in the city of Richmond, on the first Monday of October, being the first day of the same month, in the year of our Lord one thousand nine hundred.

Present: The Honorable Edmund Waddill, Jr., judge of the eastern district of Virginia.

Bank of Iron Gate
*vs.* } At Law.
James D. Brady.

Be it remembered that heretofore, to wit, on the 11th day of September, A. D. 1900, came the plaintiff in the above-entitled action and filed his declaration against the said defendant; which declaration is in the following words and figures, to wit:

*Declaration.*

Circuit Court of the United States for the Eastern District of Virginia.

Bank of Iron Gate
*vs.*
James D. Brady, Collector of Internal Revenue for the United States for the Second District of Virginia.

The Bank of Iron Gate, plaintiff, a citizen of Virginia, complains of James D. Brady, defendant, collector of internal revenue of the United States for the second district of Virginia, who is a citi-
2 zen of Virginia and a resident of Petersburg, Virginia, in a plea of trespass on the case, for this, to wit:

The plaintiff is a State bank and banking corporation chartered by and organized under the laws of the State of Virginia and is a citizen of Virginia, doing a banking business in the State of Virginia, and the defendant is the collecter of internal revenue for the United States for the second district of Virginia, and he is a citizen of Virginia and resides in the city of Petersburg, Virginia, which is in the eastern judicial district of Virginia. Between the months of November, 1899, and August, 1900, the plaintiff made, issued, and paid out seven hundred dollars of its circulating notes, payable to the bearer and intended to be used for circulation in ordinary business as currency. The Commissioner of the Revenue of the United States assessed upon these notes a tax of ten per cent. on their face value, equal to seventy dollars, which said tax is imposed upon them by the nineteenth section of the act of Congress of February 8th, 1875, and by section 3412 of the Revised Statutes of the United States, and said defendant, James D. Brady, acting as said collector of internal revenue of the United States, required of plaintiff and

demanded of it that it pay said tax; but because said action of said act of February 8th, 1875, and said section 3412 of the Revised Statutes of the United States, imposing said tax upon said notes, are repugnant to the Constitution of the United States, the plaintiff refused to pay said unlawful tax; therefore on the — day of September, 1900, the defendant forcibly entered upon the
3 premises of the plaintiff by virtue of a distress warrant held by him, authorizing and commanding him to collect said unlawful tax, and levied on and seized a large quantity of plaintiff's personal property, and was in the act of removing and carrying away said property to sell the same when the plaintiff, protesting against the illegality of defendant's act, paid him said tax to procure a release of its said property; that defendant well knew said acts of Congress imposing said tax were repugnant to the Constitution of the United States, and he entered upon plaintiff's premises and levied on and seized its property well knowing that he was doing unlawful acts, and he did the same maliciously and with the purpose and intention of doing a wanton injury to plaintiff and damaging its credit, so as to do it all the harm possible, and said unlawful act has damaged its credit and done it an irreparable injury; that the act of Congress authorizing the issue of said distress warrant to collect said unlawful tax is repugnant to the Constitution of the United States, and because all of said acts of Congress are repugnant to the Constitution of the United States the plaintiff's case arises under the Constitution of the United States; that said unlawful acts of said defendant have damaged the plaintiff six thousand dollars, and therefore it sues.

WM. L. ROYALL, *P. Q.*

And on the same day, to wit, on the 11th day of September, 1900, the writ of summons issued from the clerk's office of said
4 circuit court of the United States and is, together with the marshal's return thereon, as follows, viz:

*Summons.*

Circuit Court of the United States of America, Eastern District of Virginia, *ss:*

The President of the United States of America to the marshal of the eastern district of Virginia, Greeting:

We command you that you summon James D. Brady, if he shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office, in the customhouse, in the city of Richmond, in the district aforesaid, on the 3rd Monday of September, 1900, to answer unto Bank of Iron Gate in a plea of trespass on the case, to its damage, as it alleges, of six thousand dollars.

And have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme

Court of the United States of America, at Richmond, this 11th day of September, in the year of our Lord one thousand nine hundred, and of our Independence the 125th year.

[Seal of U. S. Cir. Court, East. Dist. of Va.]

M. F. PLEASANTS, *Clerk*.

*Marshal's Return.*

Executed this 12th day of September, 1900, by delivering to James D. Brady, the within-named defendant, in person a true copy of this writ, with copy of declaration attached, at Old Point
5 Comfort, Va.

MORGAN TREAT,
*U. S. Marshal*,
By J. E. WEST,
*Deputy Marshal*.

| | |
|---|---|
| Service | $2.00 |
| Expense | .60 |
| | $2.60 |

And at another day, to wit, at rules held in the clerk's office of said circuit court on the third Monday of September, 1900, came the defendant, by his attorney, and filed his demurrer to the foregoing declaration; which demurrer, together with the certificate and affidavit therewith, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Virginia.

BANK OF IRON GATE
*vs.*
JAMES D. BRADY.
} Trespass on the Case.

*Demurrer.*

The demurrer of the above-named defendant, James D. Brady, to the declaration of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said declaration contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said declaration, and for causes of demurrer showeth:

6 First. That it appears by the said declaration that the said defendant in all his acts as related therein was acting as the collector of internal revenue of the United States under and by virtue of the laws of the United States made for his guidance as such collector, and that it appears by said declaration that the plaintiff is a citizen of the State of Virginia, and that the defendant is also a citizen of the State of Virginia.

Second. That said declaration is not sufficient in law, in that it sets forth as the foundation for the action thereon that the acts of Congress referred to therein are repugnant to the Constitution of the United States, the defendant averring and maintaining hereby that the said acts of Congress are not repugnant to the Constitution of the United States, as alleged in said declaration.

Wherefore, and for divers other good causes of demurrer appearing on the face of said declaration, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further answer or plea to the said declaration, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

EDGAR ALLAN,
*United States Attorney for the Eastern District of Virginia,*
*Solicitor for the United States.*

We hereby certify that the foregoing demurrer is well founded in point of law.

EDGAR ALLAN,
*Att'y for Def'd't.*

7 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

Edgar Allan, being duly sworn, deposes and says that he is the attorney for the United States for the eastern district of Virginia, and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me this first day of October, 1900.

M. F. PLEASANTS,
*Clerk U. S. Circuit Court.*

And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 1st day of October, A. D. 1900, the following order was entered, to wit:

*Judgment on Demurrer.*

In the Circuit Court of the United States for the Eastern District of Virginia.

BANK OF IRON GATE
*vs.*
JAMES D. BRADY.

This day came the parties, by their attorneys, and the defendant demurred to the plaintiff's declaration, and the plaintiff joined in said demurrer, and the same being fully argued by counsel, it seems to the court that the acts of Congress set out and referred to in the declaration are not repugnant to the Constitution of the
8 United States, and the court so holds; and it therefore holds that the defendant committed no trespass upon the rights of the plaintiff in compelling it to pay the tax set out and described

in the declaration. Therefore it is considered by the court that the plaintiff take nothing by his bill, but that the defendant go thereof without day and recover against the plaintiff its costs by it about its defense in this behalf expended, and thereupon the plaintiff, by counsel, moved the court to set aside the said judgment and enter judgment for it on said demurrer, but the court overruled said motion and refused to set aside said judgment.

EDMUND WADDILL, Jr.,
*U. S. Judge.*

*Petition for Writ of Error.*

Filed October 2nd, 1900.

Circuit Court of the United States for the Eastern District of Virginia.

BANK OF IRON GATE
*vs.*
JAMES D. BRADY.

To the honorable justices of the Supreme Court of the United States and the judges of the circuit court of the United States for the eastern district of Virginia:

The petition of the Bank of Iron Gate respectfully represents that it is aggrieved by a judgment or order of the circuit court of
9 the United States for the eastern district of Virginia made on October 1st, 1900, in the above-entitled cause, as shown by its assignment of errors presented herewith. It therefore prays for a writ of error and for a reversal of the said judgment or order.

BANK OF IRON GATE,
By WM. L. ROYALL, *Its Att'y.*

*Assignment of Errors.*

Filed October 2nd, 1900.

BANK OF IRON GATE
*vs.*
JAMES D. BRADY.

Bank of Iron Gate, plaintiff and plaintiff in error, assigns as error the action of the circuit court in sustaining the demurrer of the defendant and in holding the acts of Congress set out and specified in the declaration to be consistent with the Constitution of the United States and in dismissing the plaintiff's suit.

BANK OF IRON GATE,
By WM. L. ROYALL,
*Its Attorney.*

10 Know all men by these presents that we, William L. Royall, as principal, and E. A. Holland, as suret*ies*, are held and firmly bound unto —— —— in the full and just sum of five hundred dollars, to be paid to the said James D. Brady, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of October, in the year of our Lord one thousand nine hundred.

Whereas lately, at a circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between Bank of Iron Gate, plaintiff, and James D. Brady, defendant, a judgment was rendered against the said Bank of Iron Gate, and the said Bank of Iron Gate having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James D. Brady, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Bank of Iron Gate shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. L. ROYALL. [SEAL.]
E. A. HOLLAND. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
EDMUND WADDILL, Jr.,
*U. S. Dist. Judge.*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the above is a true copy of the appeal bond filed and remaining in the papers of the cause in the said court.

M. F. PLEASANTS, *Clerk.*

11 United States of America, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between Bank of Iron Gate, plaintiff, and James D. Brady, defendant, a manifest error hath happened, to the great damage of the said Bank of Iron Gate, plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Eastern District of Virginia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of October, in the year of our Lord one thousand nine hundred.

M. F. PLEASANTS,
*Clerk of the Circuit Court of the United States, Eastern District of Virginia.*

Allowed by—
EDMUND WADDILL, Jr.,
*U. S. Dist. Judge.*

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above writ of error remains on file in the papers of the cause in my said office.

M. F. PLEASANTS, *Clerk.*

12 UNITED STATES OF AMERICA, *ss:*

To James D. Brady, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein The Bank of Iron Gate is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of October, in the year of our Lord one thousand nine hundred.

EDMUND WADDILL, Jr.,
*U. S. Dist. Judge.*

Executed this 2nd day of October, 1900, by delivering a true copy of the within citation to the within-named James D. Brady in person in the city of Petersburg, Va.

MORGAN TREAT,
*U. S. Marshal,*
By SAMUEL BENELIT,
*Deputy U. S. Marshal.*

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above citation, with marshal's return thereon, remains on file in the papers of this cause in my said office.

M. F. PLEASANTS, *Clerk.*

Original.

13 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
*Eastern District of Virginia,* } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States in and for the district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the case lately pending in said circuit court under the style of Bank of Iron Gate *vs.* James D. Brady as the same remain on file in my said office.

Seal United States Circuit Court, Eastern District of Virginia.

In testimony whereof I have hereto set my hand and affixed the seal of said circuit court, at Richmond, in said district, this 4th day of October, A. D. 1900.

M. F. PLEASANTS,
*Clerk U. S. Circuit Court, East. Dist. of Va.*

Endorsed on cover: File No., 17,933. E. Virginia C. C. U. S. Term No., 448. Bank of Iron Gate, plaintiff in error, *vs.* James D. Brady. Filed October 17th, 1900.

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above citation, with marshal's return thereon, remains on file in the papers of this cause in my said office.

M. F. PLEASANTS, *Clerk.*

Original.

13 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States in and for the district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the case lately pending in said circuit court under the style of Bank of Iron Gate *vs.* James D. Brady as the same remains on file in my said office.

Seal United States Circuit Court, Eastern District of Virginia.

In testimony whereof I have hereto set my hand and affixed the seal of said circuit court, at Richmond, in said district, this 4th day of October, A. D. 1900.

M. F. PLEASANTS,
*Clerk U. S. Circuit Court, East. Dist. of Va.*

Endorsed on cover: File No., 17,933. E. Virginia C. C. U. S. Term No., 448. Bank of Iron Gate, plaintiff in error, *vs.* James D. Brady. Filed October 17th, 1900.

MOTION

No. 1142 175

Motion to advance.



Filed Oct. 20, 1900.

IN THE

# Supreme Court of the United States.

BANK OF IRON GATE

v.

JAS. D. BRADY.

**Motion to Advance.**

IN THE

# Supreme Court of the United States.

BANK OF IRON GATE

v.

JAS. D. BRADY.

## Motion to Advance.

*To James D. Brady:*

Take notice that on November 12th, 1900, I shall move the Supreme Court of the United States to advance the case of *Bank of Iron Gate* v. *James D. Brady*, depending upon the docket of that court. I shall make said motion upon this notice, upon the grounds of said motion handed you with this and upon my brief upon the merits of the case handed you also with this.

BANK OF IRON GATE,
*By Wm. L. Royall, its Attorney.*

SUPREME COURT OF THE UNITED STATES.

BANK OF IRON GATE
*v.*
JAMES D. BRADY.
} *Motion to Advance.*

STATEMENT OF THE CASE.

The Bank of Iron Gate is a banking corporation, chartered by, organized under and doing business in the State of Virginia. In the course of its business it issued its notes as currency and paid them out as such. The Commissioner of

the Revenue of the United States assessed these notes with a tax of ten per cent. upon their face value, as the act of Congress requires him to do, and the Collector of Internal Revenue demanded payment of the tax. The Bank refused to pay the tax, upon the ground that the act of Congress imposing it was repugnant to the Constitution of the United States and void. Thereupon the Collector distrained upon the Bank's property, and, to secure a release of its property, the Bank paid the tax under protest and sued the Collector in the United States Circuit Court for a malicious injury for $6,000 damages (*Barry* v. *Edmunds*, 116 U. S. R. 550), the grounds of jurisdiction being the unconstitutionality of the acts of Congress imposing the tax, and requiring the Collecter to distrain for the tax.

The defendant filed the following demurrer, in which the plaintiff joined:

IN THE SUPREME COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BANK OF IRON GATE
v.
JAMES D. BRADY.
} *Trespass on the Case.*

The demurrer of the above-named defendant, James D. Brady, to the declaration of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said declaration contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said declaration, and for causes of demurrer showeth:

First. That it appears by the said declaration that the said defendant, in all his acts, as related therein, was acting as the Collector of Internal Revenue of the United States, under and by virtue of the laws of the United States as such collector;

and that it appears by said declaration that the plaintiff is a citizen of the State of Virginia, and that the defendant is also a citizen of the State of Virginia.

Second. That said declaration is not sufficient in law, in that it sets forth as the foundation for the action thereon that the acts of Congress, referred to therein, are repugnant to the Constitution of the United States. The defendant averring and maintaining hereby that the said acts of Congress are not repugnant to the Constitution of the United States, as alleged in said declaration.

Wherefore, and for divers other good causes of demurrer, appearing on the face of said declaration, this defendant doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make any further answer or plea to the said declaration; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

EDGAR ALLAN,
*United States Attorney for the Eastern District of Virginia, Solicitor for the United States.*

We hereby certify that the foregoing demurrer is well founded in point of law.

EDGAR ALLAN.
*Attorney for Defendant.*

STATE OF VIRGINIA,
CITY OF RICHMOND, } *to-wit:*

Edgar Allan, being duly sworn, deposes and says that he is the attorney for the United States for the Eastern District of Virginia; and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me this first day of October, 1900.

M. F. PLEASANTS,
*Clerk United States Circuit Court.*

The court entered the following order upon said demurrer and joinder dismissing the case:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BANK OF IRON GATE
*v.*
JAMES D. BRADY.

This day came the parties, by their attorneys, and the defendant demurred to the plaintiff's declaration and the plaintiff joined in said demurrer, and, the same being fully argued by counsel, it seems to the court that the acts of Congress set out and referred to in the declaration are not repugnant to the Constitution of the United States, and the court so holds; and it, therefore, holds that the defendant committed no trespass upon the rights of the plaintiff in compelling it to pay the tax set out and described in the declaration. Therefore, it is considered by the court that the plaintiff take nothing by his bill, but that the defendant go thereof without day and recover against the plaintiff its costs by it about its defense in this behalf expended, and thereupon the plaintiff, by counsel, moved the court to set aside the said judgment, and enter judgment for it on said demurrer, but the court overruled said motion, and refused to set aside said judgment.

EDMUND WADDILL, JR.,
*United States Judge.*

GROUNDS OF MOTION.

I move the court to advance this case under the provisions of Rule 32, within the provisions of which it plainly comes. The said rule has been complied with in every particular and original papers properly verified and filed with the clerk and my printed Brief is presented herewith.

The defendant's demurrer was nothing, in effect, but a motion to dismiss the case for want of jurisdiction in the court to try it. It sets up that plaintiff and defendant are both citizens of Virginia, that the acts of congress called in question by the plaintiff which are the foundations of his suit are constitutional and it calls for judgment on that case. The judgment of the court is that the acts of congress are constitutional and that the case against the defendant must come to an end.

The *ratio decedendi*, of *Murdoch* v. *Memphis*, 20 Wall, at page 626, is that when a suit is brought in a federal court because a federal question is involved, and the court decides that question against the party making it, the jurisdiction of the court over the cause ends.

As the court decided the federal question in this case against the plaintiff, the jurisdiction of the court came to an immediate end, and the cause was dismissed, therefore, for want of jurisdiction in the court. This brings the case within the letter of rule 32.

I move the court to advance this case upon another ground and to order oral argument in it. It should be heard directly after *Patton* v. *Brady*, No. 145. Both these cases turn upon the decision of the court in the Income Tax Case, they both grew out of that case and consideration of this case follows naturally after consideration of *Patton* v. *Brady*.

The case of *Patton* v. *Brady*, was advanced at the last term under rule 32 and submitted to the court February 1, 1900. It was held under advisement until the last day of the last term when it was ordered back to the docket for oral argument. It will be reached in December or January. It is a case in which the Cuban war revenue law required a person who had purchased tobacco bearing tax paid stamps to pay taxes on the same tobacco a second time. It proceeds upon the theory that by the income tax decision all taxes aimed

directly at a subject are direct taxes. It calls for an interpretation of the income tax decision. This case does the same under somewhat different conditions. But when the court is considering *Patton* v. *Brady*, it ought to have this case in its hands, as the transition from *Patton* v. *Brady* to this case is natural, logical and inevitable, and what the court does in *Patton* v. *Brady* must necessarily have an important bearing on what it will do in this case.

The claim in Patton's case is that the income tax decision has overruled *Veazie Bank* v. *Fenno*, 8 Wall, and the cases it represented and that consideration of the merits of the case must begin at that point.

In the present case the claim is the same, and it is insisted that consideration of the merits of the present case must begin at that point. The one case naturally follows the other, and the present one should be considered along with the Patton case that the court may have an entire view of the full influence of the income tax decision.

WM. L. ROYALL,
*For Plaintiff in Error.*

directly at a subject are direct taxes. It calls for an interpretation of the income tax decision. This case does the same under somewhat different conditions. But when the court is considering *Patton* v. *Brady*, it ought to have this case in its hands, as the transition from *Patton* v. *Brady* to this case is natural, logical and inevitable, and what the court does in *Patton* v. *Brady* must necessarily have an important bearing on what it will do in this case.

The claim in Patton's case is that the income tax decision has overruled *Veazie Bank* v. *Fenno*, 8 Wall, and the cases it represented and that consideration of the merits of the case must begin at that point.

In the present case the claim is the same, and it is insisted that consideration of the merits of the present case must begin at that point. The one case naturally follows the other, and the present one should be considered along with the Patton case that the court may have an entire view of the full influence of the income tax decision.

WM. L. ROYALL,
*For Plaintiff in Error.*

# PLAINTIFF'S

# BRIEF

No. 175. 175

FILED
JAN 31 1902
JAMES H. McKENNEY,
Clerk.

Bry. of Royall for P. E.

CONGRESS HAS NO POWER TO SUPPRESS

THE NOTES OF STATE BANKS.

Filed Jan. 31, 1902.

# SUPREME COURT OF THE UNITED STATES

BANK OF IRON GATE

v.

JAMES D. BRADY.

*Brief of Wm. L. Royall for Plaintiff in Error.*

IN THE

# Supreme Court of the United States.

---

BANK OF IRON GATE

v.

J. D. BRADY.

No. 175.

---

*Brief of Wm. L. Royall for Plaintiff in Error.*

---

## SURVIVAL OF ACTION.

Since this case came upon the docket of this court the defendant in error has died, and the cause has been revived against his personal representative. The Solicitor-General has notified me that he will claim that the action abated by the death of the defendant in error, and I therefore add a discussion of that question as a preface to the brief that had been already printed before the defendant in error's death.

## STATEMENT OF THE CASE.

The Bank of Iron Gate is a banking corporation, chartered by and organized under and doing business in the State of Virginia. In the course of its business it issued its notes as currency and paid them out as such. The Commissioner of the

Revenue of the United States assessed these notes with a tax of ten per cent. upon their face value, as the act of Congress requires him to do, and the Collector of Internal Revenue demanded payment of the tax. The Bank refused to pay the tax, upon the ground that the act of Congress imposing it was repugnant to the Constitution of the United States and void. Thereupon the Collector distrained upon the Bank's property, and, to secure a release of its property, the Bank paid the tax under protest and sued the Collector in the United States Circuit Court for $6,000 damages, the ground of jurisdiction being the unconstitutionality of the act of Congress imposing the tax and of the act of Congress requiring the Collector to distrain for the tax. Amongst other injuries, the Bank claimed the Collector had done an irreparable injury to its credit. The case coming before the Court on a demurrer to the declaration, it dismissed it upon the ground that all of said acts of Congress are consistent with the Constitution of the United States.

## DOES THE ACTION SURVIVE?

This question is, of course, to be determined by Virginia law. *Bauserman* v. *Blunt*, 147 U. S. R. 647.

Professor John B. Minor is authority upon Virginia law—almost as high as her Court of Appeals. In the fourth volume of his Institutes, Part I., ed. 1893, at page 614, he says:

> "It will be observed that all actions *ex contractu* are thus revivable; and also all actions *ex delicto*, where the injury complained of relates to the property. But where it relates to the person only as slander, assault, etc., it is in general not revivable."

That is the distinction made by the law of Virginia. Every wrong that relates to property survives against the personal representative. *Lee* v. *Hill, Adm'r*, 87 Va. 497; *Ferrill* v. *Brenis*, 25 Gratt. 770.

The injury here plainly related to property, and, therefore, plainly survives.

If the act of Congress under which this money was extorted from the Bank was void, then clearly Brady had the Bank's money, and the Bank could have brought an action of *indebitatus* assumpsit for it. The form of action that was brought is of no consequence. The Court looks at the facts stated and names the action for itself. In *Lee* v. *Hill*, 87 Va., the Court says:

"In determining whether a cause of action survives to the personal representatives, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced." Page 501.

This is quoted from a Connecticut court, but it is laid down as the law of Virginia.

The Court holds distinctly and unequivocally that if the injury complained of is one that an action of assumpsit could be brought for, the action survives against the personal representatives, and that whether it is brought in the form of an action *ex delicto* or not.

Section 2655 of the Code of Virginia (Code of 1887) reads as follows:

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

The case of *Lee* v. *Hill* deals with the subject both as a common law matter and as it stands under this statute.

The word "goods" includes money, so that Brady took and carried away "goods."

Bouvier's Law Dictionary, word Goods.

Anderson's Law Dictionary, word Goods.

Abbott's Law Dictionary, word Goods.

In the Elizabeth and Jane, Justice Story said, 2 Mason 407:

"It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods at common law; and a legacy of 'goods' would *ex vi termini* carry money or coin unless that construction were repelled by the context."

If the record of *James* v. *Hicks*, 110 U. S. 272, is inspected, it will be seen that the suit was commenced against the Collector's administrator, but this Court sustained it. The same is true of the *Savings Bank* v. *Blair*, 116 U. S. 200.

The gist of *Lee* v. *Hill*, 87 Va. 497, is that if assumpsit would lie for the injury, it survives against the personal representatives. The Bank could certainly have brought *indebitatus* assumpsit against Brady for money had and received.

*Elliott* v. *Swartwout*, 10 Peters 137.

*Bond* v. *Hoyt*, 13 Peters 263.

"Appropriate remedy to recover back money paid on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. When the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

*City of Philadelphia* v. *The Collector*, 5 Wall. 731-32, and see 4 L. R. A. 300 (note).

The case arises under Virginia law, and the case of *Brown, Etc.*, v. *Greenhow*, 80 Va., at page 122, is conclusive.

## ARE $2,000 IN CONTROVERSY?

I take it to be too clear for argument that the right of action against Brady's personal representative survives in this case, but a question may be raised as to whether a right of action to

recover more than $2,000 survives, so as to give jurisdiction to the Circuit Court of the United States.

It may be conceded that the right to recover damages for the wilful and malicious part of the injury as affecting the person set out in the declaration perished with Brady. But the declaration avers that Brady took possession of $70 of plaintiff's money, and being a bank, to which its credit is of the utmost importance, he intentionally damaged its credit to an extent that is irreparable. This was a "waste, destruction of, or damage to the estate" of the Bank, action for which survives under the statute. The rule in this class of cases settled by this Court in *Vance* v. *W. A. Vanderkook Co.,* 170 U. S. 472; *Barry* v. *Edmunds,* 116 U. S. 560; *Smith* v. *Greenhow,* 109 U. S. at page 671, is that where more than $2,000 are claimed by the declaration the jurisdiction will be sustained, unless the Court can see, by inspecting the declaration itself, that as much as $2,000 cannot be recovered. How can the Court say upon the averments of this declaration that $2,000 cannot be recovered for the injury done to the credit of the Bank? A jury might find that the injury done to the Bank's credit was far more than $2,000, and if that is the case, then the action for that injury survived, and the Bank is entitled to recover more than what is necessary to give jurisdiction to the Circuit Court.

I take it that the sole question in the case is whether the credit of a bank is to be considered its "estate," for if it is then that "estate" has been damaged by the unlawful act of Brady in the amount that the Bank can show to the satisfaction of a jury, and the right of action for that damage has survived under the provisions of the Virginia statute.

The Court of Appeals of Virginia held in *Peshine v. Shepperson*, 17 Gratt. 472, that injury to a merchant's credit is a wrong for which he is entitled to recover damages.

The defendant in the action asked the Court to instruct the jury that

"The plaintiff cannot recover damages in this action for injury to his credit or business standing." Page 479.

The Court said, at page 486:

"The damages resulting from injury to the credit and business standing of the plaintiff, and from the injury to his business, were, therefore, properly recoverable as natural, proximate, and necessary consequences of the acts of the defendant."

See also *Darnell* v. *Jones*, 13 Ala. R. 490; *Hartnett* v. *Plumbers Assoc'n of New England*, 38 L. R. A. 194 (Sup. Ct. Mass., 1897).

In the last cited case the Supreme Court of Massachusetts says, page 197:

"The credit of a tradesman is an important and often his most considerable resource, and he has a right to rely upon and use it in endeavoring to do business. No one has the right to attempt to destroy or to injure his credit, unless the person so attempting can show that his own legitimate interests require such action."

How much more important to it is a bank's credit?

Since this Court always follows the decisions of the highest court of a State in construing that State's laws and constitutions, there would seem to be no room for controversy in view of the decision of the Supreme Court of Appeals of Virginia in *Lee* v. *Hill*, 87 Va. R. In that case the Virginia court held that the right to a monthly salary not earned, but only contracted for, was "estate" within the meaning of the Virginia statute in question in this case, and that the right to an action for that monthly salary survived to the personal representative. The Court's especial attention is called to what is said on page 503.

Is it possible that a right to a monthly salary not earned by services will survive to a personal representative, but that a wilful destruction of a bank's credit will not survive against the personal representative of the wrong-doer under a statute that preserves the right of action for any "damage to estate."

# IN THE
# Supreme Court of the United States.

BANK OF IRON GATE

v.

JAS. D. BRADY.

*Brief of Wm. L. Royall for Plaintiff in Error.*

## STATEMENT OF THE CASE.

The Bank of Iron Gate is a banking corporation, chartered by and organized under and doing business in the State of Virginia. In the course of its business it issued its notes as currency and paid them out as such. The Commissioner of the Revenue of the United States assessed these notes with a tax of ten per cent. upon their face value, as the act of Congress requires him to do, and the Collector of Internal Revenue demanded payment of the tax. The Bank refused to pay the tax, upon the ground that the act of Congress imposing it was repugnant to the Constitution of the United States and void. Thereupon the Collector distrained upon the Bank's property, and, to secure a release of its property, the Bank paid the tax under protest and sued the Collector in the United States Circuit Court for a malicious injury for $6,000 damages, the ground of jurisdiction being the unconstitutionality of the act of Congress imposing the tax, and of the act of Congress requiring the Collecter to distrain for the tax.

The case coming before the Court on a demurrer to the declaration, it dismissed it upon the ground that all of said acts of Congress are consistent with the Constitution of the United States. This action of the Court is assigned as error, which presents the question whether the acts of Congress imposing said tax are or are not repugnant to the Constitution of the United States.

## ARGUMENT.

### DOES THE CONSTITUTION GIVE CONGRESS A GENERAL CONTROL OF THE CURRENCY ISSUES OF THE COUNTRY?

Of course, the cases of *Veazie Bank* v. *Fenno*, 8 Wall. 533; *U. S.* v. *Nat. Bank*, 101 U. S. 1, and *Hollister's Case*, 111 U. S. 62, will be cited as conclusive of this case. But I submit they are not so. *Veazie Bank* v. *Fenno* is the foundation upon which the other two rest, and if that falls they fall also.

The point decided by the Veazie Bank case was that the tax in question was not a direct tax, which, being unapportioned, was repugnant to the Constitution. That was the point argued in the case; that was the point to which the minds of counsel and the Court were directed, and that was the point upon which the case was authority. The case held then, that a tax of the character in question was not a direct tax to be apportioned, following the theory of direct and indirect taxation put out by Adam Smith and adopted by this Court in the case of *Hylton* v. *U. S.*, 3 Dallas R. But that whole idea has now been repudiated and overruled by this Court in the Income Tax cases, so that it is now the doctrine of this Court that the tax in question is a direct tax to be apportioned. The act imposing the tax does not apportion it so that it is clearly repugnant to the Constitution, unless it can be made valid by reference to some other provision of the Constitution.

When Chief-Justice Chase had disposed of the question of direct or indirect taxation in *Veazie Bank* v. *Fenno*, he could very well have ended his opinion. He had overruled the point made against the act, and it would have been enough to leave the case right at that point. He went on, however, and, it is not too much to say, out of his way, to announce an opinion upon a proposition that does not seem to have been discussed in the case. He announced, in effect, that the Constitution intends that Congress shall have complete authority over all paper issues intended to circulate amongst the people as money, and, this being so, Congress may suppress the issues of State banks as a way of excluding them from competition with the currency notes which Congress authorizes.

No authority, either in the way of adjudicated cases, or in the way of tradition or the history of our institutions, is cited in support of this position. It seems to have been evolved at that moment from the inner consciousness of Chief-Justice Chase, and, thus evolved, it is put forward as a state of things that has existed all along, although, if any historical evidence that it existed could be referred to, the Chief Justice thought it unimportant to cite that evidence.

The point actually decided in *Veazie Bank* v. *Fenno* being now overruled and repudiated by the Court, if the act under consideration can be held to be constitutional, it must be upon the last ground created by Chief-Justice Chase, unless some other new ground is to be found. What authority is there for the doctrine, except the opinion of the Court as announced by Chief-Justice Chase? It is certain that no provision of the Constitution exists expressly declaring such an authority in Congress. If it exists it must be found in construction.

So far as I have been able to discover, the first trace of this doctrine in our records is in the opinion of Mr.

Justice Johnson in *Osborn* v. *The Bank*, at page 873. Although he seems to think it was intended Congress should have complete control over the currency, it is not perfectly clear that he means paper currency. At any rate, he cites no authority for it, and it amounts therefore to no more than the individual expression of this judge. The next time I find it appearing in our record is in the dissenting opinion of Mr. Justice Story, in *Briscoe* v. *The Bank*, 11th Peters, at page 349. He there says:

"The States may create banks, as well as other corporations, upon private capital; and so far as this prohibition is concerned, may rightfully authorize them to issue bank bills or notes as currency, subject always to the control of Congress, whose powers extend to the entire regulation of the currency of the country."

I have found nothing else worth citing to the Court in support of this proposition anterior to *Veazie Bank* v. *Fenno*. It is true that when the financial discussions incident to chartering the Bank of the United States in General Jackson's administrations came on, printers' ink and paper had become much more abundant, and the cranks, perpetual motion and medicine men of that day had begun to flood the country with all kinds of wild monetary theories, as they do now, and publications supporting every conceivable sort of folly may be found amongst these. But I shall refer to none of these, leaving the case as it stands upon these authentic records. Let us look now at the well authenticated facts of our history and see how these unsupported dicta of judges consist with them.

In the days of the Colonies, the Parliament of England had undoubted authority to charter as many banks as it pleased, and to authorize them to issue their circulating notes. When the Colonies threw off their allegiance to

England the legislative body of each had every authority and power in its Colony that Parliament had had in England. These legislatures actually chartered banks before the Constitution was adopted, and authorized them to issue notes of circulation, and these circulating notes were actually passing from hand to hand around the framers of the Constitution at the very moment they were sitting in convention framing that instrument. These are incontrovertible facts. The banks that had their notes in circulation continued their existence, and the circulation of their notes after the Constitution was adopted, and, in a short time thereafter, every State in the Union had chartered banks, and, with the exception of the part played by the two banks of the United States, they furnished the entire paper currency, used by the people of the United States until the period of our civil war. The practice of the country, therefore, independent of any *a priori* reasoning, proves that in adopting the Constitution the people of the United States intended that the legislatures of the States should continue to have power to charter banks of circulation. See on this point opinion of Mr. Justice McLean, *Briscoe* v. *The Bank*, 11 Peters R., at page 317; opinion of Mr. Justice Story, *ib.*, at page 348, and opinion of Mr. Justice Nelson, 8 Wall., at page 550.

Now, when we come to look at the Constitution, framed under these circumstances, framed with these banks and their circulating notes all around the framers, we find not one word in that instrument condemning the continued existence of such banks or reprobating the issue of currency notes by them.

But there is another fact of supreme importance in this discussion. As soon as General Washington's first administration got well into operation his Secretary of the Treasury, Alexander Hamilton, commenced work on

Congress to get it to charter a national bank. All the records and debates incident to this subject and to the Second Bank of the United States were collected into one volume in 1832 and published by Messrs. Gales & Seaton, entitled "Legislative and Documentary History of the Bank of the United States," and my citations in relation to the subject will be from that volume on account of convenience. I have deposited the volume with the clerk for the use of the Court.

General Hamilton addressed an elaborate letter and report to Congress discussing the value of a bank of issue and circulation to the business of the country on December 13, 1790, and recommending that such a bank of the United States be chartered. See this report at the beginning of the volume. A bill was at once brought forward for chartering the Bank of the United States with authority to issue circulating notes. This bill was very much debated, and the constitutional authority of Congress to enact it was vigorously assailed. Did those who maintained the authority of Congress to enact it place that authority upon the proposition that Congress was authorized to control all the paper issues of the country? The men who proposed the bill and the men who denied the authority of Congress were the men who had framed and secured the adoption of the Constitution, and, surely, if any men knew what the Constitution meant those men knew. But, though the debate lasted from February 1, 1791, to February 8, 1791, and was participated in by the foremost men of the country, that debate may be scanned from end to end, and no hint at such a proposition will be found in any speech made by either those who maintained the authority of Congress, or those who denied it. The authority to charter the bank was denied upon the ground that it was not intended Congress should have power to charter incorporated companies. The authority

of Congress to grant the charter was put upon the provision authorizing Congress to borrow money (and thereby create an instrumentality useful in borrowing money), the power to lay and collect taxes, to pay debts and provide for the common defence and general welfare, and the power to pass all laws necessary and proper to carry into execution those powers. Not one word was heard of a power to provide for the circulating notes of the bank as part of a power to regulate and control the paper issues of the country, though if any of the eminent men who debated the measure had supposed any such power as that rested in the government it is incredible that they would not have adverted to it.

But though the debate fails to indicate that any man taking part in it supposed that the government of the United States had a plenary power over the currency issues of the country, it is filled from beginning to end with pregnant evidences that the debaters on both sides of the question understood that the States were to continue to have authority to charter banks of issue, and that the government of the United States was to have no sort of control over those banks or the notes they put out. I will first cite from the speeches of those who claimed authority in Congress to charter the bank and then from those who denied the authority.

## CITATIONS FROM ADVOCATES OF THE BANK.

Mr. Ames said in the course of his speech:

" Indeed, the intercourse from State to State can never be on a good footing without a bank, whose paper will circulate more extensively than that of any State bank. * * * * Is it possible to transport the revenue from one end of the continent to the other? Nay! a week before the quarter's interest becomes due transfers may be made which may require double the sum in Boston which

was expected. To guard against this danger an extra sum must be deposited at the different loan offices. This extra sum is not to be had; our revenue is barely equal to the interest due. This imposes an absolute necessity upon the government to make use of a bank. The answer is, that the State banks will supply this aid. This is risking a good deal to the argument against a bank; for, will they admit the necessity and yet deny to the government the lawful and only adequate means of providing for it? Ten of the States have no banks; those who have may abolish theirs or suffer their charters to expire. But the State banks are insufficient to the purpose; their paper has not a sufficient circulation." *Ib.* 47.

Is it possible to doubt that Mr. Ames thought the States had reserved to them by the Constitution a right to charter their banks of issue as they pleased? and is it possible to believe he thought Congress had any control over them?

Mr. Sedgwick said in the course of his speech:

"It is said there are banks already, and, therefore, the proposed incorporation is unnecessary. To this he answered, that if the government should agree to receive all its demands in the paper of the existing banks, it would give them every advantage which, in the opinion of gentlemen, renders the present system objectionable, without stipulating for any equivalent for the government. But are, he asks, gentlemen serious in their observations? Do they believe the capitals of the present banks adequate to the exigencies of the nation? Do they believe that those banks possess any powers by which they can give a projectile force to their paper, so as to extend its circulation throughout the United States? Or do they really wish to have the government repose itself on institutions with which they have no intimate connection and over which they have no control?" *Ib.* 53.

Here is a distinct repudiation of the idea that Congress has any control over the issues of State banks.

Mr. Lawrence is thus reported:

"The objections from banks being already established in the several States, he obviated by stating the mischiefs which might arise from an ignorance of the situation of those banks; and concluded by some remarks on the inexpediency of the general government's having recourse to institutions of merely a local nature." *Ib.* 54.

Mr. Gerry said:

"Are we to apply to the banks already established in the States for loans? These can no more be depended on than individuals. Moreover, the united capitals of all the banks existing in the Union would be insufficient for government; for they do not amount to a million and a half of dollars." *Ib.* 77.

Further on he said:

"That as a monopoly has been urged as an objection to the bill, no such consequence could result from it; for the bill does not restrain State or private banks, or even individuals, from negotiations of a similar nature with those permitted to the stockholders; nor does it restrain the States from forming similar corporations." *Ib.* 80.

## CITATIONS FROM OPPONENTS OF THE BANK.

Mr. Madison was the most formidable of all its opponents. He made one of his most elaborate and carefully prepared speeches against the constitutional authority of Congress to charter the bank.

In the course of it he said:

"First. The proposed bank would interfere so as indirectly to defeat a State bank at the same place.

"Second. It would directly interfere with the rights of States to prohibit as well as to establish banks, and the circulation of bank notes.

"Fourth. If Congress could incorporate a bank, merely because the act would leave the States free to establish banks also, any other incorporation might be made by Congress." *Ib.* 41.

In a subsequent speech he said:

"The Bank of North America he had opposed, as he considered the institution as a violation of the Confederation. The State of Massachusetts, he recollected, voted with him upon that occasion. The Bank of North America was, however, the child of necessity; as soon as the war was over it ceased to operate as to continental purposes. But, he asked, are precedents in war to justify violations of private and State rights in a time of peace? And did the United States pass laws to punish counterfeiting the notes of that bank? They did not, being convinced of the invalidity of such a law; the bank, therefore, took shelter under the authority of the State." *Ib.* 84.

It cannot be doubted from these passages that Mr. Madison thought the government had no control whatever over the issue of State banks.

Mr. Jackson, opposing the bill, said:

"This proposed institution is an infringement of the charter of the Bank of North America." A State bank. *Ib.* 37.

He made another speech on a subsequent day, in which he said:

"This bill will essentially interfere with the rights of the separate States, for it is not denied that they possess the power of instituting banks; but the proposed corporation will eclipse the Bank of North America and contravene the interests of individuals concerned in it." *Ib.* 55.

"State banks he considered preferable to a national bank." *Ib.* 56.

It can hardly be doubted that this gentleman thought the government had no right to interfere with the State banks.

Mr. Stone said:

"I say there is no necessity—there is no occasion for this bank. The States will institute banks which will answer every purpose. * * * It will swallow up the State banks." *Ib.* 68.

Mr. Giles said:

"Several gentlemen have said that this authority may be safely exercised, since it does not interfere with the rights of States or individuals. I think this assertion not very correct; if the States be constitutionally entitled to the exercise of this authority, it is an intrusion on their rights to do an act which would eventually destroy or impede the freest exercise of that authority; for it is wholly immaterial whether the effect be produced by the operation of this or by an inhibition in express terms—the States may not only incorporate banks, but may, of right, prohibit the circulation of bank paper within their respective limits; the act, therefore, if it be intended to have an effectual operation, will certainly infringe this right, or exist at the mercy of the State government." *Ib.* 73.

Mr. Giles thought, therefore, that the States could prohibit the national government from circulating its banks' notes in their limits, instead of the national government being able to prohibit the States from circulating the notes of their own banks. And this idea runs through the whole debate.

Upon the whole, it is to be gathered from a perusal of this debate that no one participating in it thought that the national government had any control whatsoever over the paper currency issues of the country. They un-

derstood the government to have control over national issues, but over national issues only.

It is also to be gathered that every man participating in the debate thought that the Constitution had reserved to the States the right to charter banks and to authorize them to issue their circulating notes.

When Madison, Jackson, Giles and others argued that the national bank would interfere with the functions of the State banks, issuing currency being, of course, included, as they were issuing currency, if it was thought the government was to have control of the currency, it seems incredible that the friends of the bank would not have replied that was of no consequence, as it was intended the government should have full power to control the matter as it saw fit, even to the extent of prohibiting them to issue notes.

But all of the evidence is not yet in. When the bill had been passed and had been delivered to President Washington, he referred it to his Attorney-General, Edmund Randolph, for an opinion upon its constitutionality. Mr. Randolph reported against its constitutionality. All through his opinion runs the idea that the bill interferes with the reserved rights of the States. See it—*Ib.* 86.

The President also called for the opinion of the Secretary of State, Thomas Jefferson. Mr. Jefferson also reported against the constitutionality of the bill. In the course of his opinion, he says:

"Besides, the existing banks will, without a doubt, enter into arrangements for lending their agency; and the more favorably, as there will be a competition amongst them for it; whereas the bill delivers us up bound to the national bank, who are free to refuse all arrangement, but on their own terms and the public not free, on such refusal, to employ any other bank." *Ib.* 93.

Mr. Jefferson clearly thought the States had the right reserved to charter their banks.

The President also referred the bill to the Secretary of the Treasury, General Hamilton, for his opinion as to its constitutionality. He reported in favor of its constitutionality, but there is not a suggestion, from the beginning to the end of the report, that the national government has any control over the currency issues of the country. On the contrary, the concessum runs all through his report that the States would still have the right to create their banks of issue. He says:

"All the arguments, therefore, against the constitutionality of the bill, derived from the accidental existence of certain State banks, institutions which happen to exist to-day, and for aught that concerns the government of the United States, may disappear to-morrow, must not only be rejected as fallacious, but must be viewed as demonstrative that there is a radical source of error in the reasoning." *Ib.* 97.

Again:

"Hence by a process of reasoning similar to that of the Secretary of State, it might be proved that neither of the State governments has a right to incorporate a bank." *Ib.* 98.

Again:

"There are two points in the suggestions of the Secretary of State which have been noted that are peculiarly incorrect. One is that the proposed incorporation is against the law of monopoly, because it stipulates an exclusive right of banking under the national authority; the other that it gives power to the institution to make laws paramount to those of the States.

"But, with regard to the first point, the bill neither prohibits any State from creating as many banks as it pleases nor any number of persons from associating to carry on business, etc." *Ib.* 101.

Again:

"Taxes in kind, however ill-judged, are not without precedents, even in the United States; or it might have been in the paper money of the several States or in the bills of the Bank of North America, New York and Massachusetts, all, or either of them." *Ib.* 106.

Again:

"It has been stated as an auxiliary test of constitutional authority, to try whether it abridges any pre-existing right of any State or any individual. The proposed measure will stand the most severe examination on this point. Each State may still erect as many banks as it pleases." *Ib.* 112.

In 1811 the Bank of the United States applied to Congress for a renewal of its charter, when another most instructive debate took place, from which I shall make a few quotations:

Mr. Burwell said:

"I am far from intimating that banks are useless when established with a due regard to the actual wants of the country. Measured by that standard, they form the chief resource of industry, lubricate the wheels of commerce and accelerate their motions—but the Constitution has wisely intrusted this measurement to the States; they are the most competent judges." *Ib.* 143.

It was banks of circulation and issue that Mr. Burwell was discussing, yet no man was heard to deny his proposition that the States had absolute control of the subject.

Mr. Fisk, a friend of the bank, said:

"The States cannot be restrained, nor is it to be wished that they should be prohibited all together from incorporating banks." *Ib.* 158.

Mr. Porter said:

"I have given it, if not a thorough, at least a candid and impartial examination; and the result has been a full conviction that we have no right to incorporate a bank upon the principles of the bill on the table; or, rather upon the principles of the original charter which this bill proposes to renew. The ground of my objection is, that it assumes the exercise of legislative powers which belong exclusively to the State governments." *Ib.* 167.

The debate upon this application was very long, and I might make many similar citations from it. These are sufficient, however, to show its tenor. At that time State banks had sprung up all over the country, and every one was using their notes. Many of those who framed and adopted the Constitution were still the legislators of the day, and their utterances were the same as in 1791.

## IN THE TIME OF THE SECOND BANK OF THE UNITED STATES

In 1816 Congress chartered the Second Bank of the United States. The subject was brought to the attention of Congress by a message from President Madison, which plainly contemplates that if a national bank is chartered it is to be as an ally to the State banks. *Ib.* 609.

The Secretary of the Treasury, Mr. Dallas, addressed a letter to Congress expatiating upon the advantages of a national bank, the great value of which was to be its co-operation with the State banks. *Ib.* 609. See a second letter from him (*Ib.* 613) enforcing the same ideas.

There is not a suggestion of any authority in the general government to control the issues of the State banks. Mr. Dallas says, if the State banks will not co-operate heartily with the national bank they will be notified that the government will not receive their notes. This was the utmost length that he saw his way to going. *Ib.* 618,

619. The debate became general, and the bad condition of things at that time existing because of the depreciation of the notes of the State banks was much commented on but the only remedy suggested was a national bank, whose notes could be kept at par by measures adopted by Congress. No one suggested Congress forbidding the State banks to issue their notes. It was conceded on all hands that the State banks owed no accountability of any sort whatever to the United States government.

I deviate from the above record at this point to quote from a speech made by Daniel Webster in the House of Representatives on April 26, 1816, upon the legal currency of the country. Mr. Webster said in the course of it:

"The only power which the general government possesses of restraining the issues of the State banks is to refuse their notes in the receipts of the Treasury." (III. Webster's Works, page 53. Little & Brown, 1851.)

In the debate in the House from which I have been quoting Mr. Webster said on February 28, 1816, speaking of State banks:

"These banks not emanating from Congress, what engine were Congress to use for remedying the existing evil? Their only legitimate power, he said, was to interdict the paper of such banks as do not pay specie from being received at the custom-house." (Before quoted publication by Gales & Seaton, page 648.)

At the opening of the Twenty-first Congress President Jackson called attention in his message to Congress to the fact that the charter of the Bank of the United States would expire in 1836, and he recommended an inquiry whether the charter should be renewed. In the House of Representatives December 10, 1829, that part of the message was referred to the Committee of Ways and

Means which, on the 13th of April, 1830, made a most elaborate report upon the subject, in the course of which it says:

"It must be assumed as the basis of all sound reasoning on this subject that the existence of a paper currency, issued by banks deriving their charters from the State governments, cannot be prohibited by Congress." *Ib.* 741.

I might continue these quotations indefinitely, but these ought to be sufficient to show that all men conceded that the government had no control over the issues of State banks.

The panics that came on in subsequent years and the depreciation of State bank notes caused this subject to be very much discussed between 1830 and 1845, and political parties divided upon what was to be the remedy for the condition of things. The Democratic party came forward with a proposition to pass an act of bankruptcy that should apply to State banks refusing to pay their notes in specie only, and Mr. Van Buren sent a message to Congress recommending that measure. The Democratic side of the case will be found fully set out in chapters 13, 14, and 15 of volume II. of Benton's "Thirty Years in the Senate." But in writing this history, Benton was careful to repeatedly declare that Congress had no sort of control over the issues of the State banks. He commences chapter 13 thus:

"BANKRUPT ACT AGAINST BANKS.

"This was the stringent measure recommended by the President to avert the evil of bank suspensions. Scattered through all the States of the Union, and only existing as local institutions, the Federal government could exercise no direct power over them, and the impossibility of bringing the State legislatures to act in concert left the institutions to do as they pleased; or, rather, left even the insolvent ones to do as they pleased."

Again, on page 53, chapter 14, he says:

"And is it to be tolerated, that in addition to all these privileges, and all these powers, they are to be exempted from the law of bankruptcy? The only law of which they are afraid, and the only one which can protect the country against these insolvent issues?"

Again, on page 54, same chapter, he says:

"The granted powers of the government are adequate to the coercions of all the banks. As banks, the Federal government has no direct authority over them; but, as bankrupts, it has them in its own hands."

The remedy proposed by the Whig party was a national bank, over whose notes and operations generally Congress would have entire control, which notes could therefore be always kept at par in all parts of the country, thus furnishing the people with a circulating medium of uniform value, even if they did also have their State bank notes of fluctuating value.

Daniel Webster, totally abandoning the position held by him in 1816, as quoted above, took ground in 1837 for the right of the government to control all paper issues intended to be used as currency. His position is set out with great elaboration in two speeches delivered in the Senate, reported in full in the fourth volume of his works, pages 325-403.

Benton (volume II., page 41, "Thirty Years in the Senate") makes the following reply to him:

"Mr. Webster's main argument in favor of the national bank (which was the consummation he kept steadily before his eye) was, as a regulator of currency and of the domestic exchanges. The answer to this was, that these arguments, now relied on as the main ones for the continuance of the institution, were not even thought of at

its commencement—that no such reasons were hinted at by General Hamilton and the advocates of the first bank."

This was indisputably true, as I have shown. Mr. Webster changed his opinion under the stress of circumstances, and without any adequate reason being shown for the change. Mr. Calhoun replied to the first speech referred to above on October 3, 1837, and in the course of this reply he said:

"But I go further. It is the duty of the government to receive nothing in its dues that it has not the right to render uniform and stable in its value. We are, by the Constitution, made the guardian of the money of the country. For this, the right of coining and regulating the value of coins was given; and we have no right whatever to receive or treat anything as money or the equivalent of money, the value of which we have no right to regulate. If this principle be true, and it cannot be controverted, I ask what right has Congress to receive and treat the notes of the State banks as money? If the States have the right to incorporate banks, what right has Congress to regulate them or their issues? Show me the power in the Constitution. If the right be admitted, what are its limitations, and how can the right of subjecting them to a bankrupt law in that case be denied? If one is admitted the other follows as a consequence; and yet those who are most indignant against the proposition of subjecting the State banks to a bankrupt law are the most clamorous to receive their notes, not seeing that the one power involves the other. I am equally opposed to both as unconstitutional and inexpedient." (III. Calhoun's Works, 119. D. Appleton & Co. 1853.)

In the same speech he said (page 111):

"Hence I am opposed to all kinds of coercion, and am in favor of leaving the disease to time with the action of public sentiment and the States, *to which the banks are alone responsible.*"

He added (pages 120-121) that Mr. Buchanan had completely answered Mr. Webster's constitutional argument upon the proposition that the government had full control over all currency issues. Mr. Buchanan's speech is to be seen in Congressional Globe and Appendix, first session, twenty-fifth Congress, 1837; Appendix, 273. In the same session Mr. Buchanan had already made a speech, of which the one referred to was really a part, in which he had said:

"What power does this government possess to regulate the banking system of the country? None—comparatively none." *Ib.* page 95.

## DANIEL WEBSTER'S CHANGE OF OPINION.

The truth is, Mr. Webster changed his opinion under the exigencies and stress of political considerations, as we saw thousands of single-standard gold men do within the past few years under the stress of "free silver." A recharter of the Bank of the United States was the platform of the Whig party from 1830 to 1840. That was its Shibboleth. Mr. Webster saw very plainly that the proposition was of no value unless Congress could make the notes of the bank exclusive, because it could not make them legal tender. He was accordingly driven, by political exigencies, into finding a construction of the Constitution that would authorize Congress to suppress the notes of the State banks, so as to allow the notes of the Bank of the United States to monopolize the field, and this drove him from the sound and true opinions which he held and expressed in 1816, already quoted. The result was that he constructed one of the most ingenious arguments that he ever made to justify this power in Congress, but it is an argument of which the corner-stone is a transparent fallacy. The gist of his argument is

found at pages 335-336 of volume IV. of his works. It amounts, in substance, to this: Congress, he says, is authorized to coin money and regulate the value thereof, while the States are forbidden to coin money, and are permitted to make nothing but the coins of the United States tender for debt. This shows, says he, an intention to make a uniform money system for the whole country. There was to be one money—one standard of value—for the whole nation, and that standard of value was to be currency, because it was to be "coin" that circulates by tale, and not bullion merely. Now, if Congress was to have power to set up a currency for the whole nation, the power must be one to make that currency effective. Therefore, when another currency is brought out into competition with that set up by Congress, and a "deluge of it fills up all the channels of circulation," and ousts the currency of Congress from them, Congress must have power to suppress this competing currency to make its own currency serve the purpose for which it was created and put out. It is plain that the majesty of Mr. Webster's name imposed these views upon Chief-Justice Chase (*Veazie Bank* v. *Fenno*), and that he accepted them without investigation. It is obvious that the corner-stone of this argument is the proposition that the State bank notes would crowd the government's coins out of circulation. But it is just as certain as anything can be that the State bank currency cannot crowd the government's coin out.

It is not possible to make the State bank notes legal tender, while the government's coin is legal tender. A depreciated currency which is legal tender will certainly drive out a better currency, although that also is legal tender, because the debtor will always pay in the cheapest money. But a depreciated currency that is not legal tender can never drive out a better currency, which is legal tender, because the creditor will always demand of

his debtor the best currency that he can call for, and he will accept nothing but the best. The only way, therefore, in which the State bank currency can crowd out the government's coin is for it to be just as good in all respects as the government's coin, and for the people to prefer it to the government's coin. If it is that, then no harm arises from its crowding out the government's coin.

These views may be a little startling, in view of the fact that coins did, in great measure, disappear after the first break-down of the State banks subsequent to the War of 1812, and again upon their suspension of specie payments in 1837. The reason of this was that the country was then an immense territory, sparsely settled and without railroads or telegraphs. Communication between separated districts was slow and difficult. Creditors had a right to call for coin by their contracts, it is true, but the great body of the people were interested in the State banks and in their notes, and creditors, without ability to co-operate, were loth and slow to call for their ultimate rights in face of a hostile public sentiment.

Further, though the banks suspended specie payments, their notes suffered but a small depreciation. (The notes of the "wild-cat" banks of the new and booming west are not, of course, included in this statement. I refer only to the conservative and well established banks of the Atlantic States.) So that, in spite of all the clamor about suspension of specie payments, the people of the Atlantic States did not experience much of a misfortune from coin disappearing in a measure. That great and philosophical statesman, John C. Calhoun, probed this condition of things with his customary sagacity. In the speech of October 3, 1837, already referred to, speaking of the suspension of specie payments after the War of 1812, he said:

"War was declared against Great Britain in 1812, and

in the short space of one year our feeble banking system sunk under the increased fiscal action of government. I was then a member of the other house, and had taken my full share of responsibility in the measures which led to that result. I shall never forget the sensation which the suspension and certain anticipation of the prostration of the currency of the country, as a consequence, excited in my mind. We could resort to no tender act; we had no great central regulating power, like the Bank of England; and the credit and resources of the government were comparatively small. Under such circumstances I looked forward to a sudden and great depreciation of bank notes, and that they would fall speedily as low as the old continental money. Guess my surprise, when I saw them sustain their credit, with scarcely any depreciation, for a time, from the shock. I distinctly recollect when I first asked myself the question, What was the cause? and which directed my inquiry into the extraordinary phenomenon. I soon saw that the system contained within itself a self-sustaining power; that there was between the banks and the community, mutually, the relation of debtor and creditor—there being at all times something more due to the banks from the community than from the latter to the former. I saw, in this reciprocal relation of debts and credits, that the demand of the banks on the community was greater than the amount of their notes in circulation could meet; and that, consequently, so long as their debtors were solvent, and bound to pay at short periods, their notes could not fail to be at or near a par with gold and silver. I also saw that, as their debtors were principally the merchants, they would take bank notes to meet their bank debts, and that that which the merchant and the government, who are the great money-dealers, take, the rest of the community would also take. Seeing all this, I clearly perceived that self-sustaining principle which poised the system, self-balanced, like some celestial body, moving with scarcely a perceptible deviation from its path from the concessions it had received."

The point which it is intended to bring out is, that where conditions prevent immediate concurrent action

amongst creditors, the full and complete operation of the law may be arrested for a time, and this obstacle to the full operation of the law is aided by the fact that in such conditions as we are discussing the interest of the overwhelming majority of the population is with the suspended banks rather than with the creditor class. But the law is all right in theory and must become operative, in fact, under any conditions; and would become operative now, with the facilities of steam and electricity, instantly.

In the cases, therefore, where there have been suspensions of specie payments by State banks there has been measurable ending of coin circulation, it is true, but it has been measurable only, and, upon the theory of the law, there should have been none at all. The legal status of the case was all perfect all the time, and men could always have demanded and secured coin if they had pressed for their rights. And, however public opinion and private interests might have prevented creditors from demanding their ultimate rights for a time, yet the law was bound to prevail at the end, and to bring coin back in such quantities as to suppress the potency of depreciated bank notes. In such conditions as prevailed in 1814 and 1837 creditors would be slow in making their demands heeded. But in the conditions that now prevail, with railroads and telegraphs and banking messengers penetrating every community, and the courts always open to redress grievances, creditors would assert their demands at once and in common, and depreciated State bank notes would be suppressed and banished the moment they suffered the smallest depreciation.

With all his sagacity and foresight, even Mr. Calhoun was misled to a certain extent in respect to this matter. In the speech already quoted he said at page 108:

"The conflict between bank circulation and metallic

(though not perceived in the first stages of the system, when they were supposed to be indissolubly connected), is mortal; one of the other must perish in the struggle. Such is the decree of fate—it is irreversible."

Mr. Calhoun lived long enough to see that he was entirely mistaken about this, and that there is no sort of conflict between the two. By 1860 the State bank notes of this country had come to be an entirely acceptable companion to gold and silver coins, and they all circulated together in perfect harmony. The entire financial history of the world, from 1860 to this time, has proven that they will all circulate together without the slightest friction, except that as the oversupply of silver and the lessening demand for it has caused its value to depreciate very greatly, it has been found necessary either to drop it altogether or to wholly readjust the ratio upon which it formerly stood to gold.

## THE COMMERCE CLAUSE.

Mr. Webster placed the right of Congress to exclusively control the issues of State banks upon the commerce clause of the Constitution also. (IV. Webster's Works, 338, *et seq.*) The substance of his argument is contained in the following extract from it. He said:

"The Constitution declares that Congress shall have power to regulate commerce, not only with foreign nations, *but between the States.* This is a full and complete grant and must include authority over everything which is part of commerce or essential to commerce; and is not money essential to commerce? No man in his senses can deny that; and it is equally clear that whatever paper is put forth with intent to circulate as currency, or to be used as money immediately affects commerce. * * * If Congress, then, has power to regulate commerce, it must have a control over that money, whatever it be by which commerce is actually carried on."

As already stated, Mr. Buchanan answered Mr. Webster, and Mr. Calhoun declared that the answer was complete. So far as authority goes, I think it may be said that Calhoun and Buchanan at least balance Webster.

It may be conceded that money is essential to commerce, and if there were no provision in the Constitution for Congress creating money, it might possibly be held that the power to regulate commerce carried with it a power to provide money with which commerce could be conducted. But why resort to the commerce clause of the Constitution to find authority to create money? Another provision of that instrument confers upon Congress express power to create money, and since Congress is expressly given the authority to create money, there is no need to resort to construction to find that authority. But Mr. Webster insisted that the power to create the money of commerce was not sufficient. He insisted that the power went to the length of authorizing Congress to suppress any paper issues that might be used in commerce. But *cui bono?* As I have already shown, the paper issues of State banks could not in any way interfere with the money which Congress is authorized to create. A non-legal tender bank note can never crowd out a legal tender coinage unless it is in all respects as good as, or better, through convenience of handling, than the legal tender coinage.

Again, there can be no need of authority to suppress the issues of State banks, because they might interfere with the issues of national banks, because the gold and silver coinage that Congress is authorized to create will furnish an abundance of money for the requirements of commerce. Commerce between the States is not conducted with either coins or bank notes. Commerce between the States and with foreign countries is conducted through exchange. Not one dollar of one million of

dollars of interstate or foreign commerce is conducted through either coin or currency notes. What merchant of New York, who buys tobacco in Richmond, or cotton in Charleston, or sugar in New Orleans, sends coins or currency notes to pay for his purchase? The thing is not heard of. The purchases are all paid for with exchange, and so of the purchases made by the cities named in New York. There is no necessity, therefore, for resorting to the commerce clause of the Constitution in this case. The coinage clause furnishes the money that commerce requires, and an abundance of it for all of the needs of commerce, and the notes of the State banks are powerless to drive that money out of the reach of commerce. They cannot hurt it or affect it in any way, except by being so good that traders had rather use them than to use the money of the Constitution. The point made is that where the Constitution confers a power by express grant its extent and limitations are to be sought in the grant itself. The express grant cannot be enlarged by resort to implications from other powers.

Supposing Congress has the right to provide a money for commerce, yet if the power to suppress State bank notes as competitors of that money exists it must be a suppression only, as they are competitors of that money in interstate commerce, or foreign commerce or commerce with the Indian tribes. There is no power to suppress them, as they may be competitors of that money in the commerce that goes on within the limits of a State. This is perfectly clear from the decisions of this court in the Trade-Mark Cases (100 U. S. R. 82; and *U. S.* v. *Knight Co.*, 156 U. S. R. 1). The quotation in the last case from the opinion of Lamar, J., in *Coe* v. *Errol*, 116 U. S., is conclusive.

The State bank notes must be left free to circulate within their own States, whether they compete in that

State with the money of interstate commerce or whether they do not. The suppression must be as they compete with the money of commerce in interstate transactions.

But the act of Congress complained of in this case undertakes to suppress them as competitors of the money of commerce in intrastate commerce as well as when competitors of the money of commerce in interstate commerce, and, therefore, upon the authority of the cases quoted, it is void. Under those decisions Congress should have limited its prohibitions against State bank notes to payments for goods sold across a State line. This would have prevented competition with the money of commerce, but would have left the State bank notes free to circulate in the States of their creation.

## THE UNLIMITED SOVEREIGNTY IDEA.

Having demonstrated, now, as I believe, that there is no support in the records of our country for the doctrine announced by Chief-Justice Chase in *Veazie Bank* v. *Fenno*, I proceed to examine another proposition which is strongly intimated in the speech of Mr. Webster that I have already quoted from, and that is that the government is one of unlimited sovereignty in the matter of paper currency as well as of coined money. It is plain that Chief-Justice Chase adopted this view (*Veazie Bank* v. *Fenno*) from Mr. Webster without investigation.

I insist that it was not intended that Congress should have any control at all over the paper issues that were to be used in ordinary times by the people. I insist that what the framers of the Constitution intended was that there should never more be paper money in this country (in the exact sense of money), though it was contemplated that State banks might issue their notes to be convenient representatives of money—currency—and that the national government might, in emergencies, issue its

notes to pass as currency amongst the people according to such credit as the people were disposed to give to or refuse to them. It seems to me that the debate in the convention, as Mr. Madison has reported it (Madison Papers, 1232), makes this very clear, particularly when considered in connection with his note to it, which plainly means that the government was to have power to put out its notes for money borrowed, but without the legal-tender feature, and this is the idea contained in his message to Congress in 1815.

I say this in spite of all that has been said and done since 1860, for what has been said and done since 1860 was inspired by the necessities the government was supposed to be under in the emergencies of the war. See letter of Secretary Chase to Committee on Ways and Means, Cong. Globe, 1861-'62, Part I., 618, where this idea is distinctly avowed.

## HISTORY OF THE MATTER.

It would be the merest affectation of learning to quote authorities to the Court to show the detestation of paper money that filled the minds of all intelligent men when the convention sat that framed the Constitution. I refer the Court upon this subject to Mr. Bancroft's Essay, to the Federalist, No. 44, to Mr. Justice Story's opinion in *Briscoe* v. *The Bank*, 11 Peters, at page 348. To his work on the Constitution (volume II., section 1371) and to the opinion of Mr. Justice Field in *Juillard* v. *Greenman*, 110 U. S.

What took place in the convention in reference to this matter has been very much quoted and commented on, but I think its importance requires that it shall be quoted at large again, as it is reported by Mr. Madison.

As the Constitution came before the convention for debate and amendment, section 1 of article 7 provided

that the Congress of the United States should have power "to borrow money and emit bills on the credit of the United States." (Madison Papers, 1232.) On August 16th Mr. Madison reports the following as part of the proceedings (volume III., page 1344):

"Mr. Gouverneur Morris moved to strike out 'and emit bills on the credit of the United States.' If the United States had credit such bills would be unnecessary; if they had not, unjust and useless.

"Mr. Butler seconds the motion.

"Mr. Madison: Will it not be sufficient to prohibit making them a tender? This will remove the temptation to emit them with unjust views. And promissory notes, in that shape, may in some emergencies be best.

"Mr. Gouverneur Morris: Striking out the words will leave room still for notes of a *responsible* minister which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited.

"Mr. Gorham was for striking out without inserting any prohibitions. If the words stand they may suggest and lead to the measure.

"Mr. Mason had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet as he could not foresee all emergencies, he was unwilling to tie the hands of the legislatures. He observed that the late war could not have been carried on had such a prohibition existed.

"Mr. Gorham: The power, as far as it will be necessary or safe, is involved in that of borrowing.

"Mr. Mercer was a friend of paper money, though in the present state and temper of America he should neither propose nor approve of such a measure. He was

consequently opposed to a prohibition of it all together. It will stand suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends of paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens."

"Mr. Ellsworth thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good.

"Mr. Randolph, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.

"Mr. Wilson: It will be a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered. And as long as it can be resorted to, it will be a bar to other resources.

"Mr. Butler remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power.

"Mr. Mason was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed on the other side that there was none in which the government was restrained on this head.

"Mr. Read thought that the words, if not struck out,

would be as alarming as the mark on the beast in Revelations.

"Mr. Langdon had rather reject the whole plan than retain the three words 'and emit bills.'

"On the motion to strike out, nine States voted aye and one State voted no."

As the Constitution came before the convention for debate and amendment article 12 read as follows:

"No State shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, &c."

Article 13 read as follows:

"No State, without the consent of the Legislature of the United States, shall emit bills of credit or make anything but specie a tender in payment of debt, &c." (Mad. Papers, volume III., page 1239.)

On August 28th Mr. Madison makes the following report:

"Article 12 being taken up, Mr. Wilson and Mr. Sherman moved to insert after the words 'coin money' the words 'nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts,' making these prohibitions absolute, instead of making the measures allowable, as in the 13th article with the consent of the Legislature of the United States.

"Mr. Gorham thought this purpose would be as well secured by the provision of article 13, which makes the consent of the General Legislature necessary; and that in that mode no opposition would be excited; whereas an absolute prohibition of paper money would arouse the most desperate opposition from its partisans.

"Mr. Sherman thought this a favorable crisis for crushing paper money. If the consent of the legislature could authorize the emissions of it, the friends of paper money would make every exertion to get into the legislature in order to license it.

"The question being divided, on the first part—'nor emit bills of credit.'"

Eight States voted aye, one no, and one divided (page 1442).

This is most important as showing the spirit and temper of the convention towards paper money, and it sheds a flood of light upon the foregoing debate.

I submit that the debate is absolute proof that the convention intended to deny to the United States government any power whatever to create paper money, in the true sense of money, though leaving them free to put out their notes, when borrowing money with such currency as the credit of the government could secure for them.

As proof of this, I cite the following evidence:

First. The convention was there to do that very thing. It would be mere pedantry to cite authorities to prove the general disgust of all intelligent men at that time with the bare suggestion of paper money. Mr. Ellsworth stated the case as it was when he said "the mischief of the various experiments which have been made were now fresh in the public mind, and have excited the disgust of all the respectable part of America." Mr. Langdon expressed the general feeling when he said he had rather reject the whole plan than retain the words "and emit bills."

Second. Every man who took part in the debate, with the possible exception of Mr. Gorham, thought that striking the words out would leave the government without authority to issue paper money in the correct sense of money. Gouveneur Morris, who opened the debate, shows in his second statement, when answering Butler, that he thought this would be the effect. He thought,

indeed, that striking out the words would amount to a prohibition. Butler, who followed Morris, shows in his second statement that he thought this would be the result, for he urged the striking of them out as a means of "disarming the government of such a power." It is not perfectly clear what Mr. Gorham thought would be the effect of striking them out, though the inference is very strong that he thought it would deprive the government of the power. Mason was clear that the government would have no such power unless it was expressly given. Mercer was the only friend paper money had in the discussion, and even he thought that striking the words out would leave the government without power to issue it. All he asked was that they should not go the whole length of actually prohibiting it. Ellsworth was of the opinion that striking out the words would shut out and bar the door against paper money. Randolph could not agree to strike the words out because he thought that would bar the government, though occasions for paper money should arise. Wilson thought striking the words out "would remove the possibility of paper money." Read thought leaving the words in would be as alarming as the mark of the Beast in Revelation, which, of course, meant that if they were striken out all cause of alarm would be removed. Langdon thought the whole plan had better be rejected than to leave the words in, which was, of course, the same thing as to say he was satisfied if they were striken out. These two latter meant, of course, that they were satisfied with the words stricken out, because that would mean the government had no power to issue paper money. I have reserved remark upon what Mr. Madison said to the last, because it contains the key to all. Mr. Madison asked if it would not be sufficient to prohibit making the bills a legal tender? This meant, of course, that he thought striking the words out would deprive the

government of power to issue any kind of bills, and he was not quite clear that this should be done. He thought occasions might arise when it would be important for the government to issue bills of credit, though he would, under no circumstances, consent to make them legal tender or money. His position was that the government should have power to put out its notes as an individual has, for what they are worth. This is made clear by the following note that he appended to his report of the debate:

"This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes as far as they would be safe and proper; and would only cut off the pretext for a *paper currency*, and particularly for making bills a *tender* either for public or private debts." P. 1346, note.

That clears up the whole thing and gives the cue to the Convention's action. It is what Gorham meant when he said, "the power, as far as it will be necessary, or safe, is included in that of borrowing." Madison took this view. He said, in effect, we will strike out the words and that will leave the government without power to create paper money, and still the government will be able to get all the assistance from promissory notes that it is entitled to by its ability to issue them for money borrowed. This is what Madison meant and this is what the Constitution meant.

This is made very clear from his message to Congress, already referred to, in 1815, in which he says: "If the operation of the State banks cannot produce this result" (a currency of general circulation that would meet the demands of trade) "the probable operation of a national bank will merit consideration; and if neither of these

expedients be deemed effectual, it may become necessary to ascertain the terms upon which the notes of the government (no longer required as an instrument of credit) shall be issued, upon motives of general policy, as a common medium of circulation." (Gales & Seaton's book, page 609.)

Third. Upon the whole, I submit that when every one taking part in the debate conceded that striking out the words "and emit bills" would leave the government without power to issue them in the sense of money, and when the words were stricken out, after the debate, by a vote of nine States to one, it is a *non sequitur* to conclude that the Convention may have intended to leave to the government a power to issue bills in the sense of money. Upon every principle of ratiocination the conclusion is forced that there were either none there who thought that the government would still have the power to emit the bills (in the sense of money), or else they were in such a minority that they thought it useless to speak up on the question.

The case comes down, then, to this: The dreadful experience of America with paper money made the convention resolve that this should be a hard-money country, and that there should never again be paper money here. There was to be one money for the whole Union, made out of the precious metals, and Congress was to provide that money by giving names to certain quantities of the precious metals, which had to be recognized all over the Union as the things that Congress called them.

But there were to be aids to this hard money (currency as distinguished from money), consisting of the promises to pay it, which the State banks might put out, and of such notes as the government might put out in emergencies, which (bank notes and government notes) men were

to be at liberty to receive or not as they pleased. That was the theory of the framers of the Constitution, and that is the true theory of finance, and any departure from it is an interference with the natural laws of the case.

Without any apologies whatever to the counsel who argued the Legal-Tender Cases, in 12 Wallace, I say, with great confidence, that they made a capital blunder when they placed their case upon the ground that Congress is under implied prohibitions against creating paper money, for that assumes that there is a mass of latent sovereignty in the government to be called into activity as occasion requires, when there is none. There was no question of implied prohibitions upon Congress in the case, and counsel should never have conceded that there was. The States are complete sovereigns except as they have surrendered their sovereignty to the Union, and questions of implied prohibitions upon them arise when considering the grants of power to the United States. For instance, after much variation in judgment, it is finally settled that the grant of power to Congress to regulate commerce between the States is an implied prohibition upon the States to legislate upon any subject of general commerce, requiring one uniform rule, unless Congress declares its willingness that the States may legislate upon it.

*Leisy* v. *Hardin*, 135 U. S. R. 100.
*In re Rahrer*, 140 U. S. R. 472.
*U. S.* v. *E. C. Knight Co.*, 156 U. S. R.

But the United States government has no power at all, except what is granted to it, or what is necessary to make an express grant effective. It is not for any one to say to the government, "You are impliedly forbidden to do so and so." It is for the government to point to a provision in the Constitution authorizing it to do that which it proposes to do.

Counsel did not have to show in the Legal-Tender Cases

that the government was impliedly forbidden to create legal-tender paper. The government had to show that authority to create such paper was conferred upon it.

Treating the case upon the basis of this concession by those who attacked the constitutionality of the Legal-Tender Acts, Mr. Justice Strong very naturally advanced step by step to this conclusion (but not the Court's conclusion) that the government was intended to have an unlimited sovereignty over currency, whereas, if he had been held down to proof of a grant of power, he would have found himself confronted with a very different case.

But, treating the case as it should be treated, upon the basis that the government must point to the provision of the Constitution that clothes it with power to do a thing, can the proposition that it was intended to make the government an unlimited sovereign as to money and currency be sustained?

Many have thought that this was intended, and the reasons are set out on pages 545 and 546 of 12 Wallace. But are any of these considerations, or all of them together, sufficient to raise a presumption that it was intended to make Congress an unlimited sovereign as to money and currency? Congress can be assumed to have an implied power only to make an express power effective. No other implications are permitted. Now, what is the express power? It is to coin money and regulate the value thereof. Unlimited sovereignty over the currency is not necessary for making the power to coin money effective. The grant of power there is complete in itself, and no implications of any sort are necessary. Regulation of coinage means giving names to the coins and decreeing the quantity of metal which each coin shall contain. Congress chose to call our unit of value a dollar. It could have provided that it should be called a sequin or anything else. It chose to provide that the

gold dollar should contain 25 8-10 grains of gold 9-10ths fine, and that the silver dollar should contain 412½ grains of silver 9-10ths fine. It thus "regulated" the value of the gold and silver dollars by providing a ratio that corresponded with the commercial values of the two metals. Now, unlimited sovereignty over the currency is not necessary to the regulation of the value of the coinage. That is a perfectly simple and plain function to which the power to regulate the value of the coinage is ample and complete. No implications of power of any sort are necessary, therefore, for making the power to coin money and regulate the value thereof complete. The power is complete in itself, and it asks no aid of any sort from any quarter, and when the government has coined money, and regulated its value, it has made it as effective, as currency, as it can be made. Nothing can then be added to its effectiveness—nothing can interfere with it except something that is better than coined money.

But Mr. Webster's argument, already dealt with, that the coin was to be a currency, may be fallen back on, and it may be argued that an unlimited sovereignty over the currency is necessary for making that currency perform its complete functions. But, why assume that there must be unlimited sovereignty over the subject? The thing desired is to have power to make the currency a complete currency. If a power is implied that enables the government to do that, all is given it that the case calls for. Why add unlimited sovereignty? It may be admitted that the implication goes the length of making a paper currency legal tender, though it is hard to see how making paper a legal tender can help the currency of coin. But the implication is then of a power to make paper a legal tender and not of unlimited sovereignty in connection with money and

currency. The distinction may be of great importance, for if the implication is only to make paper a legal tender the power is exhausted when that is done. But if the government is to be an unlimited sovereign in connection with the currency, that might authorize it to suppress the notes of State banks, though the Constitution plainly intended to permit the States to authorize them.

The argument by which unlimited sovereignty over currency issues is secured to Congress may be stated thus: Congress has power to coin metallic money which, *ex vi termini*, means current metallic money. Because Congress has power to create this current metallic money it must be assumed that it has power also to create current legal-tender paper money. (It is very hard to understand a necessary logical connection between these two propositions, but let that pass.) And because Congress has power to create current legal-tender paper money, therefore it must be assumed that Congress has power to prohibit the people from using non-legal-tender bank currency, although there can be no possible conflict or competition between the legal-tender paper money of Congress and the non-legal-tender paper money of banks. This is to secure a power for Congress to do whatever this Court, as constituted at a particular time, may think of public convenience and utility. A power to do anything whatever may be secured to Congress by such a course of reasoning. It is to make the Constitution a sport and a plaything.

When the Court decided that the acts of Congress called in question were constitutional, it ended the case. Its jurisdiction came to an end, and it could decide nothing more.

If it be argued that concession of the right to issue legal-tender notes as an accessory to a complete currency would necessarily carry with it the power to suppress

State-bank notes as a harmful competitor of those legal-tender notes, I make the same answer that I made to Mr. Webster's argument—non-legal-tender State-bank notes can never become a dangerous competitor to legal-tender government notes. The creditor would certainly refuse the bank notes and call for the legal-tender notes, unless, indeed, the legal-tender notes became less valuable than the State-bank notes. The fact is, there never was any occasion for the government to issue legal-tender notes. It was a false alarm that produced them. The State banks were furnishing the country all the currency it required when the legal-tender notes were put out, and they could have continued to furnish all that was required. The State banks might have suspended specie payments, but their notes would never have fallen to the state of depreciation that the government notes fell to, and for this reason. The government notes had nothing at their back but the taxing power, and that might have fallen into the hands of men who would let the government default rather than lay the necessary taxes to make the notes good. But the bank notes had all the immense resources of the banks at their backs, and, in addition, the principle so clearly explained by Mr. Calhoun in the extract quoted from his speech would, with the resources of the banks, have kept them always in fairly good shape.

Indeed, the alarm had less to do with the suppression of the State-bank currency than another consideration. The government resolved on the policy of having national banks, to have a purchaser for its bonds, and it suppressed the State-bank currency, and provided for a national-bank currency to induce the State banks to change to national banks, so as to buy its bonds and make them the basis of a national-bank currency that would pay the banks great profit at the interest the government bonds paid. This is well-known current history of those

times. So far as the currency of the country is concerned, therefore, there never was any occasion for suppressing the State-bank notes. The State banks were supplying the country with all the currency it required, and they could have continued to do so, and the time has now come when the Court should revise this whole subject and bring the government back to the moorings of the Constitution. The Constitution intended that this should be a hard-money country, with such currency aids as the State-bank notes might furnish, supplemented by non-legal-tender notes, to be issued by the government as occasion required, and that is the money system of reason and common sense, as well as of the Constitution.

To suppress paper money was one of the chief reasons the Constitutional Convention met; the debates in the convention showed that it was practically a unit against paper money; Congress was given no power in connection with the subject except to coin money and regulate the value thereof, and there are no implications of power except to make express powers effective. Paper money can be of no practical assistance to coined money, though legal-tender paper money can drive coined money out of circulation, and it may, therefore, destroy its currency; paper money as money is a theoretical impossibility, and is not called for by business under any possible conditions, as all political economists now admit. To say, in view of these facts, that there is a presumption Congress was secretly clothed with a power to create paper money is, it seems to me, to draw a conclusion that the premises will not warrant.

If we should return to the State-bank system the course of matters would be this: All the present banks in a State would at once form an association. With telegraphs and telephones, the moment a new bank was proposed, the association would be notified of it. It would

take prompt measures for warning the public against the notes of this bank, unless it first submitted its affairs to the association for its approval, and the new bank could not last one hour after the association put its brand upon it. It would result in placing the banking business under the control of the bankers of the country instead of having it under the rule of the ignorant politicians who go to Congress.

As I write I am informed that the Bank Statement for September 22, 1900, shows that the New York banks lost six millons of dollars of currency in the week ending that day. The currency has commenced to go South to move the cotton and West to move the grain. But the announcement of this bad New York Bank Statement has struck terror into all the business of the country. The Richmond merchant begins to wonder whether the Richmond banks will grant him the accommodations during the coming week that his business requires, and so of all the rest of the country. There must be something radically wrong with a financial system that can permit such consequences as this. Why should Richmond's business be dependent upon the conditions of New York's banks? But it is so, absolutely.

In that splendid address delivered by the late John Randolph Tucker to the American Bar Association in 1892, he says, in discussing the invasion of the rights of the States that are being made under the plea of implied power in the general government:

"This science of indirection has begun to transcend the boundary between the delegated powers of the government and the reserved powers of the States. The beginning is a precedent, which, if not disestablished, opens the way for indefinite invasion by the Federal government of all employments, industries, enterprises and rights of citizens, as they have been reserved by the

Constitution for that immense 'mass of legislation.' (Chief-Justice Marshall's Phrase in *Gibbons* v. *Ogden*, 9 Wheat. 1), which belongs exclusively to the States."

It is time to call a halt in these invasions of the rights of the States, and no occasion can be more appropriate than the present, which affords an opportunity for a return to that beaten path of the Constitution which we trod until the exigencies of the civil war made men think that the Constitution had better be abandoned than that the Union should be dissolved.

Of course, this argument against the unlimited sovereignty of the government in the matter of paper currency applies just as forcibly against an implied power to suppress the notes of State banks. It applies, indeed, much more forcibly, for, at the moment the convention was sitting State banks were in existence, and their notes were actually circulating around the convention; yet no word was said against them in the Constitution, as framed.

## USES OF MONEY.

The function of money, then, under modern conditions is to operate as a standard of value by which the values of different commodities are determined, after which they are exchanged through their representatives in the banks.

This was not so before steam, electricity and the enlargement of banking facilities had made business what it now is. When neither intelligence nor bulk could be quickly transported, much of the business of the world was done by actual transfers of money in exchange for goods, and much more money was necessary, therefore, then than now. But railroads, telegraphs, telephones and banks now enable men to operate almost all transactions

by exchanges of credits in the banks, and these being much simpler and easier than deliveries of money in exchange for an article, men naturally chose this method of conducting their affairs, and thereby diminish the needs for actual money.

The great, the prime, the essential need for money, then, under modern conditions is to act as a standard of value and gauge for exchange. Its uses as a factor in business are so trifling that large commercial transactions can almost dispense with it altogether, except as a standard to measure values by. But it is absolutely essential and indispensable for that purpose, and for business to be healthy and progressive its quality of standard must never be interfered with in even the very smallest degree. Otherwise the man who sends 200 bushels of corn to be exchanged for 100 bushels of wheat will be swindled, as he has valued the corn by the more valuable standard of value, while the wheat man has valued his wheat by the less valuable standard, and all commerce and trade are thus thrown into inextricable confusion and come to an end.

It results that in all cities and thickly settled communities everything is done by check, and no money is used except for the petty transactions like going to market, street-car fare and the boot-black. Therefore, if the whole country was thickly settled, there would be scarcely any use for money or currency. But a great part of the country is agricultural in its character; there are no banks in this except at great intervals, and the people who dwell there are compelled to have actual cash that they can carry in their pockets for their transactions. A check is of no use to a cowboy on the plains. He must have cash in his pocket. It is an undoubted fact that the people in our agricultural regions are wholly destitute of cash. I quote from an address I made to the Banking and

Currency Committee of the House of Representatives in December, 1896, as follows:

"Nor can a countryman get any banking accommodations of any sort. The national-bank act concentrates all the banks in the cities, and their managers do not know the farmers. A farmer applies to a national bank for a loan, and is told that the bank has no money. This means that the president don't know the farmer, and, though he may have large means, he can borrow nothing there.

"I will relate an instance that came within my own knowledge. Several years back, when I was conducting the litigation for Virginia's creditors over her tax-receivable coupons, the treasurer of Tazewell county and his sureties, who were citizens of Tazewell county, applied to me to get them the opportunity to pay what this treasurer, who was in default, owed the State. He owed about $40,000. Tazewell county is one of the most fertile blue-grass grazing regions in the world. The treasurer's sureties owned a great deal of this grazing land, and many cattle, sheep, and other animals. They were represented to me, and were, worth more than $500,000. Eighteen thousand dollars was necessary to buy the coupons with which to pay the liability, but there was no such sum of money in all of Tazewell county if it had been gleaned with a rake. They all made a joint note, and I tried to raise $18,000 on it in the city of Richmond, but no banker would even entertain the proposition. They had no money—that is, they did not know the Tazewell county farmers. If Tazewell county had been allowed her local banks, whose managers knew these men, they could have gotten the money without difficulty.

"This case was brought to my attention by Hon. Frank S. Blair, at that time Attorney-General of the State of Virginia, and I wrote to him a few days back stating the facts as I have stated them here, and asked him for his recollection of them. I have this answer from him:

"WYTHEVILLE, VA., December 15, 1896.

"My Dear Sir: Yours to hand. The case to which you refer, I think, was that of D. B. Baldwin, ex-treasurer of

Tazewell county. Baldwin and sureties came to Richmond and employed me to pay off Baldwin's liabilities in coupons. I spoke to you about it, and you said it could be done if the sureties would buy the coupons or raise the money. State Senator Robert Barnes, Clinton Barnes, Senator Joe Gillespie, and several others made a note, but my recollection is that they were not able to borrow a cent in Richmond on their note. I do not now remember the sequel of the matter. My recollection agrees with yours in the matter.

"Wishing you much success in your new law firm, I am, very truly, yours,
F. S. BLAIR.

"*Mr. William L. Royall.*"

(See hearings and arguments before the Committee on Banking and Currency, House of Representatives, Fifty-fourth Congress, first and second sessions, 1896-'97; page 184.)

I quote as follows from the "Proceedings of the Twenty-fourth Annual Convention American Bankers' Association," Denver Colorado, August 23, 24, and 25, 1898 (page 104):

"D. H. Lynch, a real estate dealer in Richmond, Va., received the following letter from a man in Nebraska, to whom he had sold a farm:

"'COLLINS, NEB., December 29, 1896.

"'Money close here and I hard up at present. The bank loans money at 3 per cent. a month when they got it, but ha'nt any to loan now. Can't borrow at all.

"'Yours truly,

"'S. H. ROBERTS.'

"This man had a farm in Nebraska worth $7,000.00, with 200 head of horses on it, and he could not borrow enough money to move to Virginia. I have the letter here; any one may look at it."

The country people, therefore, absolutely require a system of banks that will give them circulating notes.

Suppose a bank in the interior of Texas with a half a million of dollars of property convertible upon short notice into that much gold, desired to put out $500,000 of its notes. Why, in the nature of things, should it not be permitted to do so? Wall street, New York, would know nothing of the assets of that bank, and Wall street would refuse to receive its notes as payments, and they would consequently be at a great discount in Wall street. But the people who lived near that bank would know it to be a perfectly solvent institution; they would know the character of the men who managed it, and they would, therefore, have such confidence in the notes that they would accept them willingly in payments made by one to the other, and this bank and its notes would be a boon and a blessing to that region of Texas which is now without any media of exchange at all. Why, then, in the nature of things, should these Texans be kept in the condition they are now in when they could so readily provide themselves with all the currency they need, if they were not restricted from using their natural rights which the framers of our Constitution supposed they would be left in the enjoyment of? The answer in the minds of those who insist upon keeping them under these restrictions is that they will put out notes that will get into general circulation all over the United States, all of which being at a discount away from their home will cause losses to innocent and unsuspecting people. I think the possibility of evil is very greatly exaggerated.

Before the war the notes of State banks caused trouble, but why? Our steam and electric development were very imperfect, and when State-bank notes once got into a community it was hard to get them out. They were not

legal tenders, it is true, but when a North Carolina customer of a Richmond (Va.) merchant tendered North Carolina bank notes to settle his account, the Richmond merchant, to avoid discord, would feel bound to accept them, and, as there was no rapid communication between Richmond and the place issuing them, they would get into circulation in Richmond, and remain there until they were bought up by brokers and sent back to North Carolina. But every part of the country is now intersected with rapid means of communication, and all parts are in instant touch of each other. A North Carolina note would not be a day in Richmond before it would be hurrying back to the bank that issued it with a demand for payment of it in gold, or its equivalent.

Besides (and this is an essential fact to be always borne in mind) no interstate payments are now made with cash. Our net-work of banking is so complete that exchange can now be sent to every point, if not exchange on that point, exchange on New York or some other point of general commerce, which is cash everywhere, and all interstate payments are now made with exchange. The notes of local banks would, therefore, never leave home now. They would be wanted there, and would not be wanted elsewhere. They would stay where there was a demand for them, therefore, rather than go to a place that did not want them.

## A DELUSION.

The foundation of the prejudice against a currency of State-bank notes is a delusion that the business of the country requires for its effective transactions a currency note that will pass at par in every part of the Union. I submit that this is as great a delusion as the corresponding one already treated; that business is done by pur-

chase and sale of commodities for money. Who needs such a note? As has been shown, the commercial transactions of the country do not need it, for they are all operated by exchange, as already shown. No one needs such a note but travellers, and they can easily protect themselves by carrying coin or greenbacks or national-bank notes. Our States differ in no respect, so far as this matter is concerned, from the different States of Europe. England has a paper currency which will not circulate in France; France has hers which will not circulate in Italy; and Austria hers which will not circulate in Germany. And the conditions of these different countries would be in nowise improved if the currency of one did circulate in the other.

The credit of the country, therefore, is confiscated as a sacrifice to what is as absolutely a fetish as any benighted savage ever bowed down to. But, while no one really needs a currency that will circulate at par in every quarter of the Union, the fact that our entire currency, being backed by the government, will circulate at par in all parts of the Union, is a source of a terrible calamity to the country. Never mind where a national-bank note is issued, though in one of the canyons in the Rocky Mountains, it is endorsed by the United States government, and is, therefore, good for its face in Wall street. The result is that the money markets of the country bid for it all, and take it away from the country people, leaving them bare of any medium of exchange. The stock exchange and the produce exchange and the grain exchange, and all the other places where speculation is conducted, are upon one side of the street and the banks are upon the other. The banks bid for the currency of the country to lend to speculators, and the speculators increase as the banks have money to lend. The thing is automatic. As the banks have money to lend the spec-

ulators grow, and as the speculators grow the banks bid for more money, until they have all that the country has. It will be said in reply to this that speculation is done, like other business, by transfer of credit and not by purchase and sale with money. This is true. But there must be an actual deposit of cash behind every pecuniary transaction which involves a transfer of credit. When the bank lends $100,000.00 for a speculative transaction it must have a certain amount of cash in its vaults to prepresent that transaction as the borrowers may call for actual cash, and the experience of the commercial world is that it must be at least 15 per cent. This 15 per cent. of what is loaned is sufficient to draw from the whole United States a great part of the circulating medium, leaving all the rest of the country denuded.

What takes place in New York every fall illustrates this. In the fall the money of the country is all sent South and West to move the cotton and the grain crops. Consequently we hear every fall that money is tight in New York. Now, this money is not sent out to buy cotton with. That is all paid for with exchange. It is sent out to be paid to laborers, and it, therefore, gets spread out all through the country, and, while it is gone, New York is in a state of semi-panic. But the laborers soon leave it with the country storekeepers; they deposit it in the nearest bank, and New York sucks it away from the banks, and by the middle of January interest rates are again normal in New York, and the speculators that have not been swept off their feet in the semi-panic are again browsing in clover fields, while the farmers are again in a state of strangle for want of a medium of exchange. The "note good all over the country" hurts, therefore, in two ways. It causes the farmer to be without any medium of exchange, and it plays havoc with the commercial interests of the smaller commercial centers.

When one of these panics is brought about, such as the one in the fall of 1899, New York reaches out for money in all directions. The banks of Richmond, Va., send their ready money to New York for the high rates of interest paid in the panic, and the merchants and manufacturers of Richmond are unable to get the accommodations they require. If the Richmond banks do not send their cash, the large depositors, tempted by the high rates in New York, send theirs, and so the Richmond banks are left without money to lend.

But if the currency with which Richmond does her business were the notes of her own banks New York would not have them, and consequently, though the panic raged in New York, Richmond business would go on without interruption, just as the business of Paris goes on without interruption when there is a panic in Vienna or Rome.

I deposit with the clerk for the use of the Court a bound volume, being the official reports of the banks of the State of Virginia for the year 1859. It is the Virginia Legislative Document, No. 14, for that year. I invite the attention of the Court, in this connection, to the condition of the Bank of Blacksburg, a branch of the Farmers Bank of Virginia.

This bank was situated at Blacksburg, a small village of two or three hundred inhabitants in Montgomery county, Virginia, which is a blue-grass grazing region of country as fine as any in the world. It had a capital of $60,000.00 and a surplus of $50,000.00—that is, it had $110,000.00 of resources. But it had out its notes to the amount of $146,274.00, and it kept in its vaults only $29,555.00 of specie against these notes. With notes, capital and surplus it had, therefore, $256,000.00, but its deposits were only $7,042.00. It had out loans amounting to $227,000.00, which, added to its coin on hand, about balanced its resources.

Now, this trifling deposit account has a deep meaning. It means that the farmers around, who borrowed the bank's money, did not take their loans in the form of credits on which they checked. It means that they took the bank's notes and put them in their pockets, and carried them home and paid them out to their neighbors, and as everybody had perfect confidence in the bank, whose managers were the leading people of the community, nobody ever thought of going to the bank and demanding redemption of the notes in coin, so that once out they remained out indefinitely and circulated around among the people, performing the functions of money as well as the finest gold dollar in the world. This is the way in which Virginia banks were able to put out five and even eight dollars of notes for one of specie kept in their vaults, and this is the reason why they were able to issue on a small capital just as many notes as the people had any use for. The result was they could so multiply their capital that they could afford to charge very low rates of interest, and the people, generally, had an abundance of money at the most reasonable rates. Now they cannot get it at any rate whatever, and, reading in their newspapers that the New Yorkers can get all they want at one and one-half and two per cent., they naturally feel outraged.

These considerations lead me to remark that the *sine qua non* for peace and order and contentment in the United States is a banking system that will permit each locality to bank as it pleases upon such assets as it has, and will secure local directors of the local banks who are acquainted with the people, and will know to whom money can be loaned and who should be refused. The whole case lies right there. There must be local notes that will stay with the people for whom they are intended, and there must be local directors who know the people, and know who can be loaned money with safety.

The Senate of the United States published a document in the second session of the Fifty-second Congress which contains information of the utmost importance for this discussion. It is Ex. Doc. 38, Part I., 52d Congress, 2d session Senate. It shows the condition of all the State banks between 1830 and 1863. Virginia's statement is at page 99. It shows that in 1860 Virginia banks had out about ten millions of dollars of notes, and that they had had out that much for ten years and more.

I quote here from the address already referred to which I made before the Banking and Currency Committee of the House of Representatives (same volume, page 181) as follows:

Mr. Chairman and Gentlemen of the Committee: The safest plan for securing a correct view of this subject is to get some idea of the conditions which existed in 1860, and compare those conditions with what exists now. I will illustrate with Virginia, because I am perfectly familiar with the conditions there, but what I shall say will prove upon investigation to be pretty much the same all over the South and over a great part of the West.

Virginia's banks had in 1860, in the way of banking resources, $16,005,156 of capital, $9,812,197 of circulation, against which her banks held $2,943,652 of specie and $7,729,652 of deposits. (See Ex. Doc. 38, Senate, Fifty-second Congress, second session, Part I., page 99.) Her laws did not require the banks to hold any reserve at all, except that they were not allowed to issue notes in excess of $5 for $1 of specie on hand. Deducting the specie on hand, then, from the circulation, her banks had:

| | |
|---|---|
| Capital ........................ | $16,005,156 |
| Deposits ........................ | 7,729,652 |
| Circulation (specie off)............ | 6,868,545 |
| | $30,603,353 |

The Chairman: Do you assume that the banks, because

the law did not require any reserve, kept none? Is it not probable that the banks kept the same reserve then as now?

Mr. Royall: I have here the reports for the year 1859, and you will find very little reserve beyond that of specie. They kept what prudence and experience required.

Mr. Fowler: How much did they keep on an average?

Mr. Royall: The specie should be counted, and you will find that some banks did not issue two dollars to one of gold that they held, and others went as high as 8 to 1. The reserve varied.

Mr. Fowler: The law provided that they should not have more than $5.

Mr. Royall: The $5 limit had reference to note issues, not reserve. Some banks issued 5 for 1, and some had 8 for 1 of specie. In other words, it was within the control of sensible men, whose business was managed safely, according to the circumstances of the case. That is the proposition I am here to contend for. The record will bear me out in what I say.

Mr. Fowler: How long had those banks been in operation?

Mr. Royall: From the foundation of the colonies. The system ha l grown up with the States.

Mr. Fowler: And was gradually changed.

Mr. Royall: Yes; it was gradually changing all the time, according to circumstances.

Mr. Fowler: Have you the record of failures in Virginia for any period?

Mr. Royall: No, sir; I have not; but the record was not worth preserving, because there were no failures of importance, and you will be surprised when you learn the facts.

The census of 1860 shows that her population then consisted of 1,047,411 whites and 490,865 negroes, but the negroes were all, except a small fraction, slaves, incapable of making contracts, and they are not, therefore, to be considered in the case. One million of white people, then, had $30,603,353 of banking capital. What is her condition to-day? The report of the Comptroller of the Currency for 1895 shows that her national banks have:

| | |
|---|---|
| Capital, surplus, and undivided profits. | $ 8,061,689 |
| Deposits | 13,829,545 |
| Total | $21,891,234 |

But the national act requires 15 per cent. of the deposits to be held as a reserve, so that when this is taken off, as we took the specie off in the case of the State banks, they have only $19,816,808.

Now, the census of 1890 shows that Virginia has 1,655,-980 inhabitants, and as the negroes are now as capable of contracting as the white people, it results that 1,655,980 people have only $19,816,808 to do business with, as against $30,603,353 that 1,000,000 of people had in 1860. The Virginian of to-day naturally sighs for the conditions of the Virginian of 1860.

The Chairman: What is the per capita to-day?

Mr. Royall: It is twelve or thirteen dollars.

Mr. Hill: I thought you left out the national-bank reserve in stating Virginia's present bank resources?

Mr. Royall: I did; and my statement includes only the capital, surplus fund, and undivided profits of the national banks. The notes are simply capital in another form, and if you included them it would be double.

Mr. Fowler: Have you the record to show what the rates of interest were before the war?

Mr. Royall: The legal rate was 6 per cent., the same as now, and the banks are now supposed to follow that, but they do not. They charge high rates—whatever they can get.

Mr. Fowler: Is the rate higher now?

Mr. Royall: The rate is 6 per cent. now, but there are hardly any banks which charge less than 7.

Mr. Brosius: What is the State rate of interest?

Mr. Royall: Six per cent.

Mr. Brosius: Do the national banks charge more?

Mr. Royall: I don't want to get our banks into trouble. I have no right to say.

Mr. Brosius: I understood you to say so.

Mr. Royall: Well, I have paid more. Money is very high now in Virginia. But when we analyze the case a little more closely, we find the great body of the Vir-

ginians—those who live in the country—entitled to make a still more serious complaint.

The following shows the banking resources of the seven cities of importance in Virginia at this time, under the national-bank law, as taken from the report of the Comptroller of the Currency for 1895, the 15 per cent. being taken off, to wit:

| | |
|---|---|
| Richmond | $ 6,112,720 |
| Lynchburg | 2,655,333 |
| Petersburg | 443,104 |
| Norfolk | 2,159,887 |
| Alexandria | 1,071,868 |
| Roanoke | 1,040,318 |
| Staunton | 1,305,126 |
| Total | $14,788,416 |

These seven cities have less than 250,000 inhabitants. We find, then, that 250,000 of the people of the State—those who live in the cities—have $14,788,416 of the bank resources, while 1,435,000 of the people—those who live in the country—have only $5,028,392 to do their business with.

These country people in Virginia think that this condition is an outrage upon them. They rightly hold the national-bank act responsible for it, because it is suited only to the commercial centers, and draws everything to them, leaving the country denuded.

Mr. Cox: In taking the seven principal cities and giving their population, in your comparison of capital stock, I think you make an error by taking the aggregate population of the rural districts.

Mr. Royall: No, sir; I think not.

Mr. Cox: When you take that population, you seem to throw all the rest of the banks into the country; but there are banks besides those in the seven cities.

The Chairman: The country people get accommodations in the cities.

Mr. Royall: I mean to say that a great part of the people have no place where they can get bank accommoda-

tions. The banks are chiefly in the cities, and the great body of the people are remote from them.

Mr. Cox: I wanted to bring that point out.

Mr. Royall: Those seven cities have 250,000 inhabitants, and have fifteen millions bank resources, and a million and a half in the rural districts have only five millions bank resources and practically no banks.

Now, Virginia bank notes in 1860 were at a discount of only one quarter of 1 per cent. in New York, which was enough to send them home as fast as they got there, so that the people of Virginia had the greatest abundance of money at all times at reasonable rates of interest, and I may add here that no man ever lost a dollar by a Virginia bank note. It is also in order to say here, that the Atlantic States had the very best currency system in 1860 that any people ever had. It had grown up and developed by the processes of evolution, and it satisfied the wants of the people perfectly. The prejudice against the notes of State banks grew up in the West, which was a new country developing very rapidly. It had "boom" banks as it had "boom" towns and "boom" everything else. But the "wild-cat" bank notes were incident to this newly developing civilization, and not to the system of State banks. This is the all-important fact to bear in mind. While the West was struggling with the "wild-cat" notes, which, after all, built it up, the old Atlantic States were enjoying the most perfect currency system that ever existed, and if that could be the case then in the Atlantic States why can it not be the case now in all of the States? There are no more new States to grow up. All are old and settled States, and a "wild-cat" bank could not grow up now. The moment it was attempted information of it would be transmitted to all the present banks, they would throw out its notes when presented for deposit; that fact would be instantly sent to

every quarter, and the "wild-cat" bank would go out of sight.

I will quote again at this point from the aforesaid address I made to the Banking and Currency Committee (same volume, page 190), as follows:

I have been something of a student of the writings of Charles Darwin and Herbert Spencer, and I have long ago come to the conclusion that man creates nothing valuable. Whatever we have in our institutions that is worth anything has grown up under the exigencies of necessity through the principles of evolution. Herbert Spencer has reasoned out the case of banking, as one that must grow up under these principles in that masterly essay upon "State tamperings with money and banks," and he declares that "from the first, banking legislation has been an organized injustice." Mr. Buckle also well remarks in his work on civilization that the most important work ever yet accomplished by the legislator has been in repealing and undoing what some previous legislator had done. The perfect system of banking has yet to appear. When it comes, it will be by natural growth, and it will not be the creation of the law-maker.

The truth is, the world's entire experience with banking has been very limited. The experience of most of the world is of little value. That of England and the United States furnishes most of what is worth studying. Banking in England has grown up to its present state under the principles of evolution, cramped and distorted by statute law. To a certain extent, evolution has produced admirable results there. They have country banks all over Scotland, England and Ireland that issue their own notes, which are at a discount a little way from where they are issued, but which serve the people of the neighborhoods that issue them most acceptably.

Mr. Brosius: Do you say, do I understand you to mean, that the notes issued by the joint-stock banks of England are usually at a discount a short distance from the bank that issues them?

Mr. Royall: I am told so by Englishmen.

Mr. Brosius: Those notes are all redeemed in the notes of the Bank of England?

The Chairman: It costs something to get them.

Mr. Royall: Yes, sir; and I am told by Englishmen that they are at a small discount a little distance from the banks issuing them.

Mr. Brosius: I never heard of that before this, and that is why I asked you particularly about it.

Mr. Royall: I will give you the name of the Englishman who has given me this information—Mr. J. F. Jackson, of Richmond city. He was born and raised in England and lived there until recently, when he came to Virginia.

(NOTE.—The day after this discussion Mr. Royall applied to Mr. Jackson for a statement upon this subject, and he gave him the following, which is inserted here by permission of the committee.)

**Letter of J. F. Jackson, Esq., of Richmond, Va.**

"RICHMOND, VA., December 23, 1896.

"Dear Sir: I have read with great pleasure your most able argument before the House Committee on Banking and Currency. Permit me to offer one or two observations upon the subject for your consideration, with the view, if possible, of strengthening your argument in favor of further and better banking facilities for our people. This is the true remedy for our woes, as I think you have shown, and as I will endeavor to support, from the example of England and Scotland, and especially of Scotland.

"You remark in the course of your argument that 'banking in England has grown up to its present state under the principles of evolution, cramped and distorted by statute law. To a certain extent evolution has produced admirable results there.' This is true. Evolution in England and Scotland has produced a banking system which is based now only on the same principles which control all other commercial enterprises conducted by corporations there, except only that no banks established since the bank-charter act was passed (in 1845, I think) have power to issue notes.

"The banks established previous to that date had power to issue notes. In England the smallest of these notes is of the value of £5 ($25) and in Scotland of the value of £1 ($5). This right was reserved to these banks to the extent of the amount of the notes then in circulation, provided that they did not open banking offices in London. If they did so, they then forfeited this right. Several have so forfeited the right. This limited circulation of notes still exists, and these notes exactly perform the function which you contend State-bank notes would perform here. They 'stay at home' and simply accommodate a local demand. Away from home they are at a discount, if accepted at all. I have myself paid 1 shilling (24 cents) to have a five-pound note cashed only twenty-six miles away from the place where it was issued, and this in a large city having close business relations with the town in which the note was issued, and where the bank issuing it is one of the strongest financial institutions of the place.

"This being at a discount away from home is a condition inherent in such notes by the very terms of their issue. They are and can only be redeemable over the counters of the institution issuing them, and are thus an inconvenient form of currency for any bank or individual to hold, except close to the place of issue. They are not easily convertible into cash to meet an emergency, except at home, and therefore are not acceptable. They are simply a local currency. The principle of evolution has led up in England and Scotland to the establishment of the principle that the government has nothing to do with the banking system of its people, and no more right to interfere with it than with other trades or businesses.

"Acting on this principle, the notes of such banks as still retain the right to issue them are not secured by any deposit of securities with the government, nor does the government exercise or claim any right or power to examine into the affairs of any bank. The stockholders in the banks themselves control the business, and the ability to pay the notes issued is simply secured by the capital of the banks, and their value depends entirely upon the confidence of the people among whom they cir-

culate in the stability and credit of the banks issuing them.

"This is a sound principle. If the people who find the capital to establish a bank will not look after its proper management, all the supervision of government officials possible cannot prevent its mismanagement. No more potent illustration of this principle can be needed than the fact that national banks here are constantly failing while subject to government supervision. A notable instance of this is the recent failure of the large bank in Chicago.

"Based on this principle, the English banks have constantly increased in numbers and in the amount of their capital, until now they have banking houses or offices open in over 2,500 different places in that country, and a banking capital of hundreds of millions sterling. The very large majority of these banks are merely branches of the parent institutions. They are controlled by the directors of the parent bank, and many of them are merely offices open on one or two days in the week. This is the case in small country places, where the business is not sufficient to warrant the establishment of a local bank. The parent institution sends down one of its officers once or twice in the week with the necessary facilities for conducting business, and so accommodates the local community. After a time the business grows and a permanent office is opened, and thus the daily needs of the people are met. I know banks that now have a dozen branch offices, which, when I was a boy, had not one. The consent of no authority is needed to open these branches, and no special capital is required. The directors of the parent bank decide when and where it is desirable to open a branch and act upon their own judgment and decision.

"The Scotch banking system, which has been said by eminent authorities to be the nearest perfect of any system in the world, differs somewhat from the English one, in that it is based on a very limited number of large and wealthy banks, having their head offices in Edinboro, with branches all over the country. These large banks are nearly all very old institutions. The oldest of them dates back to 1695, and the most recent of them was founded in 1838. They are only ten in number, but they

have a subscribed capital of £29,135,000 ($145,675,000), and a paid-up capital of £9,302,000 ($46,510,000). They were all established prior to the passing of the bank-charter act, and have, therefore, the right to issue notes. The exercise of this power is only limited by the discretion of the directors, and is subject to no supervision by government, nor is any deposit of securities required.

"These ten banks have over 1,000 branches open in the towns and villages of Scotland. You cannot go into any little community in any part of Scotland without finding one or more banks open on one or more days in the week. Under this system, Scotland, with an area of only 30,000 square miles, or 15,000 square miles less than Virginia, and with a population of about 4,000,000, has the best banking facilities of any nation in the world. The result is seen in the thrift and prosperity of the Scotch people. The Scotch farmer can go to one of these branches nearest his farm and get the accommodation he needs. He is not called upon to make a note and have it discounted, and thus pay interest upon the whole loan, whether he uses the money at once or not. He asks for an overdraft of such a sum as he will need or as he thinks the bank will give him.

"The local agent knows him, and, acting on this knowledge, decides as to making the overdraft. Usually these overdrafts are secured by one or two of the borrower's friends becoming security for him on the books of the bank. He then, when the overdraft is granted, draws upon the bank just for the amount he needs and pays interest only on what he draws and for only the time he needs it. Interest is charged on the daily balances. If the overdraft is discharged by deposits, interest ceases until the account is again overdrawn, and so the accommodation is always available until withdrawn at the least cost within the limit of the overdraft originally granted. Such a system is needed here, and would do more to build up this State and every other State than any plan of government aid or silver coinage that could be devised.

"Surely it is possible for Congress to take a lesson from Scotland. Canada did so. Her banking system is very like the Scotch one. The only point, I believe, wherein it differs is that the banks there are required to pay a per-

centage on their note issues into the hands of the government to be held as an insurance fund to meet liabilities on the notes of any bank which may fail. Canada has not made, and does not now make, any outcry for 'free silver,' or any other governmental aid or supervision. Her people have free banking and abundant banking facilities on the Scotch system, and they find money to be in sufficient supply for their needs with a less per capita circulation than this country. Surely, what meets their needs would meet ours. Their conditions are similar to ours, and only an imaginary line parts us from them on much of the boundary between the two countries.

"Yours truly, J. F. JACKSON.

"*W. L. Royall, Esq.*"

Mr. Royall: You can see in the report of the Director of the Mint for 1895 (at page 355) the state of these banks, the amount of notes they issue, and the specie they keep on hand to redeem them with. It is a very surprising statement.

I will add another quotation from the same address, as follows:

"I say the farmers must have actual cash, and the only bank notes that will serve them are the notes not good in other localities. The note that is good all over the country leaves the farmer and goes to New York and Chicago for the use of stock, grain and cotton speculators. The old State-bank notes of these farmers, though despised elsewhere, served their purposes. The Blacksburg farmer I have referred to, when he borrowed money, did not leave it on deposit in the bank. He put it in his pocket, in the form of the bank's notes, and carried it out into his neighborhood and paid it out to his neighbors, and it circulated among them indefinitely, answering all the purposes of money and giving them all the media of exchange that they needed. General Bradley T. Johnson, who has recently been in Cuba, tells me a gentleman there named Sanchez owns a plantation 100 miles square, on which many thousands of the people live. He coins all

the money used on this domain. He keeps a deposit of United States bonds in New York, on which he borrows all the gold necessary to redeem his coinage with, and, that being so, his coinage circulates among the people on his estates, and is as good money for their purposes as the best. It will not pass outside the limits of his domain, as our gold coin will not pass in Europe "—

Several Members: Oh, yes, it will!

Mr. Hill: I think you are mistaken there. I was offered 90 cents more for $60 worth of gold in Europe than its face value.

Mr. Royall: And a banker did it—a skilled man who knew the difference between the alloy of our gold and of his country's gold.

Mr. Hill: No.

Mr. Royall: I was in London in 1884 and went to the Ascot races with a gentleman named Mr. Munsey, from Jersey City. We only took a few dollars in English money, supposing that would be sufficient. (Laughter.) We did not know what it cost to get in. We learned something. We won't do it any more. I mean we won't carry a few dollars only any more. There was a big crowd there—the Prince of Wales and a lot of big people—and when we went to the ticket office to purchase our tickets they told us the tickets were a pound apiece. We didn't have that much, and we thought we would have to go back to London. But I had a twenty-dollar gold piece of our money, and I offered that and said to the ticket seller: "This is worth the price of four tickets, but I will give it to you for two tickets." He would not accept it. That is an illustration—

The Chairman: That simply showed the ignorance of the person.

Mr. Royall: Exactly. It shows you cannot pass our gold among people who do not know it in the country at large. But then a very curious thing happened. I turned off sorrowfully and was confronted at once with Mr. Robert Garrett, the president of the Baltimore and Ohio railroad. I knew him and was glad to see him. I went up to him and said: "Our gold money has been refused; give me some English money for it," and he said, "Certainly," and he took out a roll of £5 bills and skinned me off four

of them, both of us mistaking them for $5 bills, and I gave him the $20 gold piece. He had given me $100. I had great trouble in hunting him up next day to give it back to him. I suppose I ought not to have done it—it was bad financing. Our good coin will not pass there any more than our good Virginia notes would pass in your New England States.

Mr. Fowler: That fellow might be a good judge of horses, but he did not know anything about money.

Mr. Royall: That's the way; you can sell our money to the bankers and brokers, but the people do not know it; you cannot pass it at the stores and markets. It is exactly the case with our notes. They were good in Virginia, but not good up among your people.

Now, I say this money of Sanchez contains the true idea of a banking system.

I make one further extract from the same address, as follows:

I have told you a good deal of the Virginia of the past. Let me now tell you something of the Virginia of the present. We have at Richmond a magnificent up-to-date railroad locomotive plant, capable of turning out 300 engines a year and of giving steady employment to more than 1,000 men. When the panic of 1893 came on, this plant had on hand an order for more than sixty locomotives, and it was working more than 700 men. The banks shut down, and this concern, though backed by the most ample capital and collaterals, feared it would be unable to perform its contract because it could borrow no money.

I put the case very mildly when I say fear. They could not get the money, with an abundance of collateral, and the owners of this concern are some of the richest men we have.

The Chairman: What were their resources estimated to be?

Mr. Royall: I could not undertake to say that; and I am treading a little upon their private affairs to go into this matter I have mentioned at all. I can only say this: That

they have no trouble in getting what money they want on collateral whenever they want it. They have an abundance of collateral for all their purposes, and they back this concern whenever it wants backing.

Mr. Fowler: But, at the time you speak of, they could not get it on any collateral?

Mr. Royall: They could not get it on any collateral; that was the trouble.

Confronted with that proposition—the proposition that they would have to close up—they took the bull by the horns, and issued their own notes with which to pay their men. The notes were at a small discount, but the merchants soon began to receive them freely. The company kept this up for some six months; they completed their contract and delivered the engines. Now, if there had been no tax in the way, why could not our city banks have issued these notes, and why should they be denied the right to do it?

We have forty-odd millions of dollars' worth of property in Richmond, every dollar's worth of which is capable of being turned into banking capital, and all of which would be turned into banking capital that the necessities of any case required if there were no obstacles in the way. Yet if one of our large concerns gets a large order, it has to run to New York or Boston to get the money with which to execute it. Why should we not be at liberty to use our own resources for them? We have the resources; why should we have to go to New York or elsewhere to get the necessary money?

The Chairman: Do you not expect to have banking capital enough under any conditions to meet every exceptional case—that is to say, if a case comes up where a large sum needs to be borrowed in addition to the normal demands of banking capital, it is the custom in every section of the country to get that from other sections. Each section comes to the aid of the others under such circumstances.

Mr. Royall: I do not mean to say, sir, that we could deal with every case. I say we could have dealt with this case we were confronted with without any difficulty. This locomotive works that I have mentioned gets the largest orders in our city; they get very large orders. Our banks

could take care of them if they were unhampered. They could get the necessary money. But now they have to run to New York or Boston to get the necessary money to execute a large order. I say if our banks were unhampered they could furnish the money.

The Chairman: What do you mean by unhampered?

Mr. Royall: I mean if this tax were taken off. I have just given you an illustration of it. Here was a concern that had to pay off over 700 men. The great difficulty was the want of circulating notes. It takes a great deal of money to pay that many men. If our banks had been unhampered they could have furnished it. You may say we have the national banks. I say, no; they are embarrassed, and that, with all the red tape of national banking, they will not answer the purpose. Oh, they say, this emergency may pass over. I won't go into the venture, for the reason that the national securities I shall have to buy may fall in price on my hands. Now, the State banks would have nothing of this kind to confront them, and so they can deal with every emergency that has ever arisen there—if they were freed, if they were unhampered. If one of our farmers offers to sell another a horse for $100, the answer comes: "I will give you some wheat or some tobacco for your horse, but I have no money." There is absolutely no money or other medium of exchange among our farmers.

The national-bank system is a system of paternalism under which government imposes benefits in such quarters as it thinks entitled to them, and the result is that the rich and strong get, under it, all that is worth having. The State-bank system is the system of individualism under which banks spring up through the processes of evolution wherever they are needed, and rich and poor share alike in their benefits, the rich having no advantages over the poor, but all being served according to their deserts.

A State bank is like a spring in a desert. The waters percolate through the adjoining soil and green grass

grows up all around, its borders always enlarging as the grass grows healthy and strong. It is a strange banking system that is founded upon a national curse, a national debt. What will become of the system when the debt is paid?

So far as governmental supervision over banks is important to protect the public against spurious or worthless issues, who shall say that the State legislatures are not just as competent as Congress to provide those safeguards? The legislatures of the new States in 1861 might not have been, but the legislatures of the old States of 1900 are just as competent.

WM. L. ROYALL,
*For Plaintiff in Error.*

NOTE.—I print as an appendix to this brief a part of a circular letter addressed by a committee of leading citizens of Richmond, Va., to the banks of the South, memorializing them upon the importance of the subject of this litigation. It is as follows:

## APPENDIX.

RICHMOND, VA., April 25, 1900.

*To President and Directors of the Several State Banks Throughout the South:*

The committee has decided to address you in regard to this matter of such vital importance to all the people of the South, and especially the agricultural communities, where a system of barter is carried on because of the absence of banks to accommodate those known in the community as worthy of credit, but who are unknown in the distant cities where State banks exist only because of the profit to be derived from large deposits. The profit from circulation is absolutely necessary to the establishment of banks in rural districts, and under the National-

Bank Act, even as amended recently, it cannot be expected that banks will be established, for the reason that they cannot be made to pay. What would be the result with a national bank with $50,000 capital?

| | | |
|---|---|---|
| That sum would *pay for, say, $48,000, United* States 2 per cent. bonds, the interest on which would be | | $ 960 00 |
| $48,000 of currency, less 5 per cent. for redemption, say, $45,000 loaned at 6 per cent | | 2,700 00 |
| Assuming that the deposits would equal the capital, say, $50,000, less $7,500 for reserve, $42,500 at 6 per cent | | 2,550 00 |
| | | $6,210 00 |
| U. S. tax of ½ per cent. on $48,000 circulation | $ 240 00 | |
| Salaries and rent | 2,500 00 | |
| State tax | 190 00 | |
| | | 2,930 00 |
| | | $3,280 00 |

This is a very poor showing to induce capitalists to contribute money to establish national banks in the country, and incur the individual liability attaching to stockholders under the national-bank system.

Through the efforts of this committee an act of the Legislature of Virginia to provide for State banks of circulation was so amended March 5th as to authorize the organization of banks of issue in any village or town, with a capital of not less than $10,000, and banks in any city with not less than $50,000, without individual liability to the stockholders, and with authority to issue notes to the extent of its capital and surplus, keeping on hand 25 per cent. of the circulation in gold or silver. Under this act (should the United States tax of 10 per cent. be declared unconstitutional) the showing as inducement to capitalists to establish banks in rural districts would be as follows:

| | | |
|---|---|---|
| Capital paid up | $50,000 00 | |
| Issue of currency | 50,000 00 | |
| Estimated deposits | 50,000 00 | |
| | | $150,000 00 |
| Less 25 per cent. in gold or silver to be held for redemption of notes | 12,500 00 | |
| Ten per cent. of deposits | 5,000 00 | |
| | | 17,500 00 |
| | | $132,500 00 |
| $132,500 loaned at 6 per cent | $ 7,950 00 | |
| Less U. S. tax ½ of 1 per cent. ........ $ 250 00 | | |
| Less State tax .40 ........ 200 00 | | |
| Salaries and rent ........ 2,500 00 | | |
| | 2,950 00 | |
| | | 5,000 00 |

This profit would justify 8 per cent. dividend and the accumulation of a surplus, while the profit may be increased from increase of deposits, and from increase of circulation, to extent of any surplus that may be accumulated.

In the case of a national bank with $50,000 capital, it will be observed that the community would be accommodated with loans to the extent of $87,500, while under the State banking act with the same capital and ample safeguards for the redemption of notes, and payment of deposits, the accommodation to the community would be to the extent of $132,500. If there could be State banks in every agricultural center, the savings of the community would be there deposited, to be loaned out instead of being hid away in old stockings. The prohibitory 10 per cent. tax has deprived agricultural communities of banking facilities, and has prevented the sober, industrious man from using the credit that would be extended to him if he lived in the vicinity of a bank. Herein lies the explanation of the discontent of the South and West in

regard to the money question. Every State should have its own banking system. It is not possible to embody in a single banking act provisions to suit the varying conditions in the different sections of this vast country. The objection urged aganst State-bank currency, that it may become " wild-cat," is absurd. Each State is as competent to protect its people from worthless currency as the Federal government. In this day of easy and quick communication between widely separated sections it would not be possible to circulate a note not well secured. The advantage claimed for a government note or national-bank note, that it will circulate in any part of our country, is enjoyed at a frightful expense to the South and West, where it is not profitable to establish national banks. The growth of those sections has been in every way retarded in all the years since the war between the States, that inaugurated national banks. These sections should not longer submit, and the State legislatures should move in the matter.

The convenience of a bank note that is taken in any part of our country must be acknowledged, but the evil that it works is hidden from the masses, and, like the seeds of some disease, left without remedy, slowly undermines the Constitution. That evil in the national-bank note is the readiness with which it travels to New York, the financial center of this country, and is kept there until the urgent necessity for its use in agricultural regions to move the crops tempts it away to obtain the exorbitant rates of interest the farmers and planters are made to pay. It may be asked what it is in New York that so attracts the national-bank note. The answer is that the vast amount of importations from other countries, for distribution in all parts of this country, are landed there, and must be paid for there. Consequently exchange on New York is in demand at all other parts of the United States. The banks, therefore, ship currency there for purposes of exchange, and also to receive a small rate of interest allowed by the New York banks, for the reason that the accumulation of currency there fosters speculation, and has built up great stock and produce exchanges, enabling the banks to lend money on call to speculators at varying rates, yielding handsome profits to the New

York banks, and at times, especially when currency must be drawn away from New York to move the crops, the great speculators are forced to pay enormous rates of interest to carry their stocks and produce, and the banks in other cities are tempted by higher rates of interest to send more currency there, withdrawing or reducing the accommodation to business-men at home, and so the business of the country is distributed by oft recurring semi-panics. The great banks and trust companies of New York are the beneficiaries, and are upholding the national banks, and are ready to fight against the repeal of the 10 per cent. tax, through which their riches are increasing at the expense of the South and West. Surely you must see the great need of the people for local, *i. e.*, State-bank currency, and the importance of this effort to have the 10 per cent. tax declared unconstitutional.

The country was prosperous before the war, with State banks only. While a few people were victimized by "wild-cat" money issued from inaccessible places, the evil was as nothing compared to the great accommodation extended to all the people. The State of Virginia had in circulation for about twenty years before the war an average of about $10,000,000 of State-bank notes, and they were always promptly redeemed in coin when presented. It cannot be said either that they could not be used in other States. They were freely taken by merchants and others in all the States, but were not received for deposit in the banks of other States, and it was well that they were not. They were at a discount in other States of one-half of 1 per cent., and were purchased by exchange brokers, and sent home for redemption. And so it would be with State-bank notes now, if we could have them. They would be used chiefly at home for the accommodation of the people in every part of the State.

Note the lack of currency in the Southern States from figures made up three years ago: The twelve Eastern and Middle States, with a population of 21,000,000, had outstanding note issues of $120,000,000; while the eleven Southern States, with a population of 20,000,000, had but $18,000,000 of outstanding notes. The Eastern and Middle States had about $5.75 per head, and the Southern States had less than one dollar per head; while the South,

with its people widely separated, requires even more currency than the Eastern and Middle States, where so many more transactions can be settled by checks.

Our State banks are entitled to the profit to be derived from circulating notes, and our rural districts must have banks, and can only obtain the capital to establish them through the promise of profit from circulating notes. Let us, then, have your aid in this effort to rid ourselves of the iniquitous 10 per cent. tax. Please send contributions to Colonel William H. Palmer, Treasurer, City Bank, Richmond, Va.

R. A. LANCASTER,
JOHN L. WILLIAMS,
JOSEPH BRYAN,
E. B. ADDISON,
W. M. HABLISTON,
*Committee.*

## IMPOST, EXCISE, OR DUTY.

P. S.—It has occurred to me since this brief was printed that I should possibly discuss the question whether the tax in question can be sustained as an impost, excise, or duty. It is plainly not an impost, which is a tax charged at the custom house upon imported goods. It is just as plainly not an excise, as that is a tax upon personal property or a license tax upon the sale of property or upon an occupation.

Whether it is or is not a "duty" as that word is used in the provision for imposing "imposts, excises, and duties," requires perhaps a separate discussion. I have discussed these three words, "Imposts, Excises, and Duties," very fully in the general in my brief in *Patton v. Brady*, and I bind that brief up with this brief and pray the Court to read and consider what I have there said upon those three words. I shall here devote a few remarks to "Duty" as specially applicable to the case in hand.

"Duty," as is shown in the Patton brief, was intended to describe the taxes that are imposed upon written or printed instruments by requiring them to bear stamps, and, if this be true, it would be enough to say in the present case that this tax is not a stamp tax, and it cannot therefore be sustained as a "duty."

But it is just as well to examine the question whether, if it had been imposed by way of stamps to be affixed to the notes of State banks, it could have been sustained.

It is not too much to say that if any member of the convention of 1787 had said in that body that the power to impose "duties" would authorize the United States Government to require stamps to be imposed upon the notes of the State banks he would have been thought a wild man. The History of the Times makes it perfectly evident that the framers of the Constitution expected the States to continue to issue circulating notes, redeemable in coin, which they expected to play a great part in the

currency of the country. In addition to what is said in the previous part of this brief upon this subject, the Court is especially asked to read critically what is said by Mr. Justice Nelson in *Veazie Bank* v. *Fenno*, 8 Wall., at page 549 *et seq.* This is one of the most luminous opinions in all the reports of this court's decisions, and its statements of historical facts cannot be successfully challenged. Expecting the State bank notes, therefore, to be a most important part of the currency, if any member had said that bringing the word "duty" into the Constitution would authorize the government to require stamps to be placed on these notes, and therefore to suppress them, he would have been thought out of his head, and if it had been made clear to the convention that this consequence would follow, it is safe to say that the word "duty" would never have been given a place in the Constitution. It was expected that each State would charter as many banks of issue as it chose to charter, the notes to be redeemable in coin, and it never entered into the head of any one that authorizing the government to impose "duties" would interfere in any way whatever with that right and power. To say otherwise is to close one's eyes obstinately to the whole letter and spirit of the record of the day.

It may be argued that imposing stamps upon the notes of a State bank would be no more than a method of charging a license tax upon the business of the banker. The first answer to this is that any such theory is an utter perversion of what the framers of the Constitution had in their minds as their purposes and intentions are known to students of their history to have been. But the technical and legal answer is that such a license tax would be a charge upon those bankers only who were conducting the business of banking under charters from the States. All other bankers conducting exactly the same business would be exempted from the charge. This would be an utterly unequal and unjust "duty," and it would fall under the ban of the doctrine of *Oliver* v. *Washington Mills*, 11 Allen 268 (see brief in *Patton* v. *Brady*, p. 25 *et seq.*), as the excise in that case did.

So, if it should be argued that this tax is an excise upon the business of a banker under a State charter, the same reply can be made. It imposes its burden upon that banker only and exempts all other bankers doing exactly the same business from the burden.

If in imposing excise taxes Congress is to be permitted to specialize in this way, what are the limitations upon the specialization? The Court will probably hold that Congress is not obliged to impose an excise upon every business because it imposes it upon one. It will probably say that Congress can impose an excise upon the tobacco or the liquor business without imposing one upon the iron business. It may also go the length of saying Congress may impose an excise upon the manufacturers of plug tobacco without imposing one upon the manufacturers of smoking tobacco. But can it specialize in a class? Can it say that the business of some manufacturers of plug tobacco shall bear an excise while the business of other manufacturers of plug tobacco, doing exactly the same business in all respects as the former, shall be exempt from that excise? If it may do this, then why may it not go the length of saying those manufacturers of plug tobacco who have red hair shall pay an excise while those having hair of other colors shall be exempt? Why may it not say that those manufacturers of plug tobacco over six feet in height shall pay an excise while those below that height shall pay none?

The doctrine of *Oliver* v. *Washington Mills*, 11 Allen 268, is perfectly sound, and it utterly reprobates and condemns any such theory as this.

The peril of the day is in the great combinations of capital that we call "trusts." I was an advocate of the doctrine of industrial combination until I saw those resorting to it were running it into extremes. I now see perfectly well that it must be curbed and controlled. It is now logic run mad. Some means of controlling this doctrine must be found or we will drift into

either revolution or a degrading industrial slavery. The present monopolistic trusts are the legitimate progeny of the money monopoly created by the National Bank law. The corrective is the enfranchisement of the State banks. The legislatures of the States are as capable of putting such restrictions upon these as the case calls for as Congress is.

Make the State banks free, so that the credit of the people may be unfettered, and each locality will be able to protect itself against the encroachments of the trusts.

WM. L. ROYALL,
*For Plaintiff in Error.*

IN THE

# Supreme Court of the United States.

---

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

---

JAMES D. PATTON, Trading as James D. Patton & Co.,

*vs.*

JAMES D. BRADY, Collector of Internal Revenue for the Second District of Virginia.

---

BRIEF OF WILLIAM L. ROYALL FOR PLAINTIFF IN ERROR.

---

*Facts of the Case.*

---

The plaintiff in error is a merchant and trader in the city of Richmond, and the defendant is the Collector of United States Internal Revenue.

In the month of May, 1898, the plaintiff bought 102,076 pounds of manufactured tobacco, on which all taxes were paid, and which bore on it stamps cancelled after April 14th, 1898, and the same was removed from the factory. He bought it in the regular course of business, expecting to make a profit from a rise in the tobacco.

On the 13th of June, 1898, Congress passed the new War Revenue Bill which imposed an additional tax of three cents a pound on this tobacco, and the defendant in error coerced plaintiff in error into paying $3,062.28, the amount of this additional tax. Plaintiff paid it under protest, applied to the Commissioner of the Revenue for the return of it, was refused, and then he brought his suit to recover same in the United States Circuit Court for the Eastern District of Virginia. The court held the act of Congress imposing the tax to be constitutional and dismissed the suit, and this writ of error was sued out.

### Assignment of Error.

The action of the court in dismissing the suit is assigned as error.

### Death of Defendant in Error.

After this cause was docketed in this court and before it was reached for argument the defendant in error, Brady, died, and the cause was revived under the rule of the court against his personal representatives, and as the Solicitor General has notified me that he will claim that the cause abated with the death of Brady, I proceed to discuss that matter, premising that I filed a brief upon that question at the last term of the court as well as a brief upon the merits; and that seeing reason to add to both of these, I now combine them in this one brief, and I ask the court to take the case upon this brief rather than upon those other two.

### Does the Action Survive?

This question is, of course, to be determined by Virginia law.

*Bauserman* v. *Blunt*, 147 U. S. R. 647.

Professor John B. Minor is authority upon Virginia

law—almost as high as her Court of Appeals. In the fourth volume of his Institutes, Part I., ed. 1893, at page 614, he says:

"It will be observed that all actions *ex contractu* are thus revivable; and also all actions *ex delicto*, where the injury complained of relates to the property. But where it relates to the person only as slander, assault, etc., it is in general not revivable."

That is the distinction made by the law of Virginia. Every wrong that relates to property survives against the personal representative. *Lee* v. *Hill, Adm'r*, 87 Va. 497; *Ferrill* v. *Brenis*, 25 Gratt. 770.

The injury here plainly related to property, and, therefore, plainly survives.

If the act of Congress under which this money was extorted from Patton was void, then clearly Brady had $3,000 of Patton's money, and Patton could have brought an action of *indebitatus* assumpsit for it. The form of action that was brought is of no consequence. The court looks at the facts stated and names the action for itself. In *Lee* v. *Hill*, 87 Va., the court says:

"In determining whether a cause of action survives to the personal representatives, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced." Page 501.

This is quoted from a Connecticut court, but it is laid down as the law of Virginia.

The court holds distinctly and unequivocally that if the injury complained of is one that an action of assumpsit could be brought for, the action survives against the personal representatives, and that whether it is brought in the form of an action *ex delicto* or not.

Section 2655 of the Code of Virginia (Code of 1887) reads as follows:

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

The case of *Lee* v. *Hill* deals with the subject both as a common law matter and as it stands under this statute.

The word "goods" includes money, so that Brady took and carried away "goods."

Bouvier's Law Dictionary, word Goods.

Anderson's Law Dictionary, word Goods.

Abbott's Law Dictionary, word Goods.

In the Elizabeth and Jane, Justice Story said, 2 Mason, 407:

"It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods at common law; and a legacy of 'goods' would *ex vi termini* carry money or coin unless that construction were repelled by the context."

If the record of *James* v. *Hicks*, 110 U. S. 272, is inspected, it will be seen that the suit was commenced against the collector's administrator, but this court sustained it. The same is true of the *Savings Bank* v. *Blair*, 116 U. S. 200.

The gist of *Lee* v. *Hill*, 87 Va. 497, is that if assumpsit would lie for the injury, it survives against the personal representatives. Patton could certainly have brought *indebitatus* assumpsit against Brady for money had and received.

*Elliott* v. *Swartwout*, 10 Peters 137.

*Bond* v. *Hoyt*, 13 Peters 263.

"Appropriate remedy to recover back money paid on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. When the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

*City of Philadelphia* v. *The Collector,* 5 Wall. 731-32; 4 L. R. A. 300 (note).

The case arises under Virginia law, and the case of *Brown, Etc.,* v. *Greenhow,* 80 Va., at page 122, is conclusive.

ARGUMENT ON MERITS.

I understand the income tax decision, in its last analysis, to mean this:

Every tax that Congress can levy under the Constitution is a direct tax to be apportioned according to population, unless—

*First.* It be some sort of indirect tax of which we have so far had no example. (The court said, 157 U. S. R., at page 557, "And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, impost and excise,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances have invited thorough investigation into sources of revenue." This idea runs through the whole opinion in this volume and also in the next.)

Or *second.* Unless it be an impost, a duty, or an excise, in which case it is to be uniform only, even though it may also be a direct tax.

Assuming this to be the law, I shall examine the present case with that as its starting point.

If this assumption is correct, then the retroactive part of the third section of the act of June 13th, 1898, is clearly repugnant to the Constitution, unless—

(a) It is one of those indirect taxes mentioned, or

(b) Such an impost, duty, or excise, as is contemplated by the Constitution.

I can conceive of no ground upon which it can be said to impose one of the indirect taxes referred to.

It is not an impost. The word impost was used by the framers of the Constitution to describe the taxes laid upon goods imported through the custom-house.

This tax is clearly, therefore, not an impost. Nor is it a duty. (Duty same as impost. 7 Wall. 445, etc.) The word duty was used to indicate such taxes as are represented by stamps on papers.

The following is reported by Mr. Madison to have taken place in the Convention on August 16th:

"Mr. L. Martin asked what was meant by the Committee on Detail in the expression 'duties' and 'imposts.' If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.

"Mr. Wilson: Duties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties, etc." The Madison Papers, Vol. III., page 1339. See to same effect opinion of Harlan, J., 158 U. S. 649, bottom of page. This meaning of "duty" is placed beyond all question by Luther Martin's letter. 1 Elliott 368.

## Duty, What?

In his argument in *Hylton* v. *U. S.*, 3 Dall. 171, Alexander Hamilton said: "If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered an 'excise.'

. . . An argument results from this, though not perhaps a conclusive one, yet when so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works (Lodge's ed.) 333.

This so obviously just principle of construction is quoted by this court, with apparent approval, in the income tax cases. 157 U. S. R., at page 572.

The "excise" was introduced in England from Holland in 1642. In 1694, during the reign of William the Third, the principle of imposing taxes by requiring written or printed instruments to have stamps affixed to them was also introduced in England from the same country. Dowell's History of Taxation, Vol. 2, page 62.

Both excise, in spite of its unpopularity, and stamps were ever afterwards held on to tenaciously by the English government, but each was held to as a principle independent of and separate from the other. There was a department of government controlled by a Board of Commissioners of Excise that superintended the collection of the excise taxes, and there was another department of government controlled by a Board of Commissioners called the "Commissioners for Managing the Duties on Vellum, Parchment and Paper" that superintended the collection of all taxes imposed by the sale of stamps on written or printed instruments. But these two departments of government were as entirely separate and distinct from each other as the war and the navy departments were, and the nature and character of the taxes grew thereby to be considered and treated as being essentially different. In the vernacular, and in scientific treatment of the subject, imposts were understood to be taxes collected at the ports, excise was understood to be taxes imposed upon consumable goods, and stamp duties were understood to be the taxes imposed

upon written or printed instruments through affixing to them stamps bought from the government. This was the common understanding of the people in England in 1787, when the framers of our Constitution were sitting in convention, and, *ex vi termini*, it was the common understanding of our own people, who had the same understanding of such matters as their English brethren, from whom they had just been separated.

In 1804 the Parliament of Great Britain revised all the laws imposing stamp duties and consolidated them into the act of 44, George Third, Cap. 98. This act enacts no new legislation, but only brings into one act the dozens of acts that had been passed since the introduction of stamp duties over a hundred years before; and it shows, in its schedules, that Parliament raised revenue by requiring stamps of differing values to be affixed to almost every written or printed memorial of the transactions of men. The "stamp duties," therefore, were a matter of as familiar every-day talk to our ancestors of 1787 as the "protective tariff" is to us. And as they were not included in England in what was understood either as imposts or as excise, but were a set of duties separate and apart to themselves, and were a most important branch of revenue, they required a separate word in framing our Constitution to authorize their imposition; and hence, as Wilson said, they would be authorized by the word "duties," while they would not be authorized by either imposts or excises.

It is perfectly clear, therefore, that in authorizing "duties" the framers of the Constitution had in mind to empower Congress to raise revenue by requiring stamps to be affixed to written or printed instruments. It cannot be denied that "duty" is sometimes used in the Constitution in a wider sense than that contended for here, but in the place where Congress is given power to impose "taxes, duties, imposts and excises," "duty" is there meant to de-

scribe the taxes raised by selling stamps to be affixed to written or printed instruments.

## Excise, What?

We come now to the question, What was meant by excise?

Dr. Johnson's Dictionary was published in 1755. It defines the word thus:

> "A hateful tax levied upon commodities, and adjudged, not by the common judges of property, but wretches hired by those to whom excise is paid."

Sir William Blackstone says also of the excise in his Commentaries, Vol. I., page 320 (margin), published about the same time:

> "But from the original to the present time its very name has been odious to the people of England"; and after mentioning a number of articles that had been added to the list of those "excised," he says of it: "A list which no friend to his country would wish to see farther increased."

The excise was first introduced into England by the Long Parliament during the great rebellion, though when it was noised abroad that Parliament contemplated doing it, it resolved that any person saying it intended to do so should receive condign punishment. It was universally unpopular because of the tyrannical authority conferred upon the Commissioners of Excise who collected it. Nevertheless, it was held on to by the government steadily, and the opposition to it either died out or was little heard from. This encouraged Walpole to introduce his general statute of excise in 1733. The statute contained no new principle, but it was called "the Excise Bill," and the name damned it. It divided parties and created such a furore as had not been known in England in many years. Dr.

Johnson and Sir William Blackstone wrote while the echoes of this partisan strife were still in their ears, hence the bitterness of their language. See an account of Walpole's bill in Dowell, Vol. II., page 100, *et seq.*

The best treatise upon excise that I know of is that contained in the Encyclopedia Britannica word "excise," though containing a plain error in saying excise is confined to home goods. It defines the word thus:

"A duty charged on home goods either in the process of their manufacture or before their sale to the home consumers."

The Century Dictionary defines the word thus:

"An inland tax or duty imposed on certain commodities of home production and consumption as spirits, tobacco, etc., or on their manufacture and sale."

The case of *Rex* v. *Justices of Surry*, 2 Durnf and East 510, was decided in 1787 at the very moment the Constitutional Convention was sitting. It held that, technically and accurately speaking, excise dealt with liquors only. In the second volume of the thirtieth edition of Burns Justice (the work is in the library of the Bar Association of New York City), word excise, the following language is found:

"The duties of excise, *properly so called*, are those imposed on ale, beer, cider, perry, mum, mead and spirituous and other liquors, and also on malt, chicory and sugar, home-made, being particularly so denominated by the laws of excise or so accounted by them.

"But, according to *R.* v. *Justices of Surry*, 2 T. R. 504, the distinction generally understood between excise duties and inland duties under the management of the Commissioners of Excise is this: That the law of excise is understood to relate only to liquors; and that the inland duties

under the management of the Commissioners of Excise are understood to apply to malt, dry goods and other articles which had of late been put under their management."

From this it would appear that excise applied, technically, in England in 1787 to liquors only, and if that is to be understood as the sense in which the framers of our Constitution used the word, then this tax upon tobacco is not an excise, but a direct tax, and it is plainly void because not apportioned. But, as the extract from Burns Justice shows, there were other taxes put under the control of the Commissioners of Excise, and these others had, in common understanding, come to be considered excise duties, and the court may therefore hold that the word was used in our Constitution in this popular rather than in its technical sense.

There is the more reason for expecting that this will be the view of the court from the fact that the larger sense is the one in which it had certainly been understood in this country. In Massachusetts they had for a long time had the tax known as the excise, and it was understood there to apply to many things other than liquors. This is shown by the debate in Congress in 1794 over the carriage tax as quoted by Chief Justice Fuller in the income tax case, 158 U. S. R., at page 623, as follows:

"The bill passed the House on the 29th of May apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the annals. 'Mr. Madison objected to this tax on carriages as an unconstitutional tax; and as an unconstitutional measure he would vote against it.' Mr. Ames said, 'It was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachusetts this tax had long been known; and there it was called an excise.' "
Just as the tax on carriages was at that time called an excise

in England, as is shown by the extract from the work of Bell & Dwellypost.

The Encyclopedia Britannica's article on the word excise concludes thus:

"The numerous statutes of excise, well annotated, have been collected and published under the authority of the Commissioners of Inland Revenue in one volume; 1873."

I made a vain search through this country and England for this volume by this name for a long time, but recently I found in the library of the Bar Association of New York City a volume purporting to be the laws of excise by Bell and Dwelly, 1873, which is manifestly the work referred to by the Encyclopedia Britannica. It contains, as a preface, a reference to every statute ever passed by Parliament upon the subject of excise.

In a note to page 4 the authors of this work say:

"In 1797 the following articles were subject to excise duty, viz.: Auctions, bricks, glass, hops, licenses, malt, paper, soap, spirits (British), vinegar, starch, stone bottles, sweets and mead; tea, tiles, beer, candles, coaches, cocoanuts and coffee, cider and perry, hides and skins, pepper, printed goods, salt, spirits (foreign), tobacco and snuff, wine, wire."

This affords a favorable opportunity for enquiring, When is a congressional tax upon personal property an excise, to be uniform only throughout the United States; and when is it a direct tax, to be apportioned according to population?

The dictionaries, as we have seen, say that an excise is a tax upon consumable HOME, personal property. But, as the above extract shows, the tax on tobacco was considered an excise in England when the Constitution was adopted, and not a pound of tobacco was ever grown in

England. All of it from which taxes were collected was imported from abroad, and the tax on it was paid at the custom house as one of our imposts. The first excise imposed in England was on ardent spirits also, and it was imposed upon foreign liquors as well as upon domestic. I do not understand where the dictionaries got this notion that an excise involved the idea of "home goods" anyhow. There is certainly nothing in the legislation of England to justify it.

But if excise may be addressed to foreign goods as well as to domestic, then the enquiry is suggested, May consumable foreign goods that have paid their imposts at the custom house be excised in the hands of the merchant who has them for sale, or in the hands of the consumer who has bought them for use? If they may, then excise is greater than ever was veto even.

The materiality and importance of this enquiry will be further illustrated when a subsequent part of this brief treating of the scope of excise is reached.

I again repeat the question then, What is the rule for determining when a tax on personal property is an excise, to be uniform only throughout the United States; and when it is a direct tax, to be apportioned? Where does excise end and direct tax begin, the court having decided in the income tax case that personal property may be the subject of direct taxation?

If it be said that the "home goods" test is to be dropped, and that the test is to be "consumable commodities," still the question will come back, Are imported consumable commodities that have paid their imposts at the custom house to be excised thereafter?

To my mind, the subject is involved in hopeless confusion, and the only logical solution of the difficulty is for the court to go back to the case of *Rex* v. *Justices of Surry* and hold that excise is a tax on ardent spirits only, and

that all other taxes on personal property are direct taxes, which would make the tax in this case void.

I fear, however, that the popular and dictionary idea of excise will be adopted by the court, and I shall therefore argue the case upon the assumption that this will be done.

The first point to be noted in respect to excise is the character of the tax. It is not a tax at all. It is, as its name indicates (excise—cut out of), a scoop into a subject by the law-making power without any reference whatever to the proportional part of the public burdens which that subject should bear. Parliament dipped into a barrel of beer and took out of it as much as it pleased. It dipped into a box of tobacco and took out the number of pounds that suited it. It "excised" a subject—cut out of it so much as it wished.

The "excise" was a tax in Massachusetts from the foundation of the colony, and its character has been the subject of judicial enquiry there. In *Oliver* v. *Washington Mills*, 11th Allen, the court, speaking of the difference between a tax and an excise, says, at page 274:

"An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid."

This is intended to refer only to the character of the tax, and not to the persons or classes of persons on whom it may be laid, as will very plainly appear when this case is more particularly commented on later on.

To determine then what excise means we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature

of the tax as judicially determined; and we have, third, the definition of it, or the common understanding of men about it,as given by the Encyclopedia Britannica and the Century Dictionary. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them.

Assuming then that the court has decided the income tax case according to the intentions that the framers of the Constitution had in their mind, and giving to the words, imposts, duties and excise, the interpretation suggested in this brief, we have a highly artificial system of federal taxation, but we have the Convention fashioning a very complete system that would enable the government to reach fully every possible source of revenue; but with restrictions placed in all directions, such as the framers of the Constitution thought would be appropriate to any given exercise of the taxing power. We have the government given full authority to raise revenue from all articles brought into the country by as high duties as it pleased to impose, subject only to the restriction that those duties should be uniform. We have it given authority to require men to pay as much as it pleased upon all the written or printed memorials of their transactions, subject only to the condition that the duties should be uniform, and then we come to the two great subjects of production and consumption, and when we get there we find it gives authority to impose direct taxes, or taxes upon the sources of what is to be consumed; that is, production, at any rate it pleases, so that these taxes are apportioned according to population; and we find it given authority to impose excise, or taxes, upon what is consumed at any rate that suits it, subject to the sole condition that they shall be uniform.

This scheme covers the whole field of taxation and makes

it yield all that can be got from it, but by a system that makes taxation bear upon the country and on districts lighter or heavier as the Convention thought the nature of the case required.

Since tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed, I shall assume that the court will hold that the tax in this case is an excise.

Modern conditions have, of course, greatly modified the early objections to excise, if indeed they have not entirely obliterated them. Nevertheless, the tax is essentially an arbitrary imposition, utterly wanting in all the elements of proportional and, therefore, just taxation, and it behoves the court to enquire curiously into each exercise of this arbitrary power as it comes before the court to see to it that spoliation is not accomplished under the guise and name of excise taxation.

## First Proposition Contended For.

The first proposition advanced in this case then is that Congress may excise an article as it pleases so that the excise does not amount to spoliation or confiscation. But that having excised it, it has excised it, and the power is exhausted. It cannot excise a second time.

Possibly the property is not therefore to go free of taxation thereafter because it has been excised. If a man who has paid an excise upon a thousand boxes of tobacco chooses to stack it up in a warehouse and keep it there ten years, the tobacco is not, possibly, to go tax free because it has borne an excise. It receives the protection of the laws, and it should bear its part of the burdens of the laws. But it is to be taxed thereafter according to the principles of taxation, and not according to the arbitrariness of excise. Taxation upon it thereafter is to be direct taxation

imposed according to population, which makes it bear a burden that is proportional to that borne by other property.

The court must put some limitations upon this word, and there is a great reason why this construction should be given to the word excise. The government's construction, under which it has imposed a heavy burden upon one of its citizens who bought tobacco upon its assurance that the property had paid all obligations to which it was liable; permits the government to set a trap for the unwary and make them the victims of that confidence in their government which all good citizens should have. It enables the government to delude its citizens into well justified business ventures of which the government will seize the profits when the citizen had supposed he had made a well earned reward. It enables the government to make the citizen speculate and risk his resources for its benefit, where he supposed he was speculating for his own benefit. And though in this case the government robbed him of only three thousand dollars, the principle would allow it to rob him of three millions of dollars if the transaction involved any such sum.

The construction contended for safeguards the citizen in his daily pursuits where he might be often entrapped upon the government's theory. Tobacco is not the only article excised. Indeed, if we are to suppose that all articles excised in England when our Constitution was adopted, may also be excised here, many of the articles of ordinary traffic may be brought under the excise. The citizen is liable, therefore, to be entrapped upon many articles besides tobacco and spirits. In dealing with articles which bear the government stamps, marked "cancelled," the citizen ought to be considered as in the same class with those who buy negotiable paper. The government should be just as much held estopped to impose additional burdens upon the article, except in the due and orderly course

of equal taxation, as the maker of the negotiable instrument is held estopped to set up equities against the bona fide holder without notice. And, at last, what is the government deprived of by such a construction? Of the additional tax upon tobacco which can be hurriedly made up between the proposing of the tax and the enactment of the proposition into law? That ought not to be much, but much or little, it is better the government should lose that much than that it should be clothed with an arbitrary power to ruin the citizen at its will.

It may be said the person who purchases tax-paid tobacco may add the new tax to the price he asks for his tobacco. But if the principle is to be accepted, there is no reason why the additional tax may not, with the old tax, be more than the new tax on new tobacco, and the purchaser may, therefore, be compelled to sell at a loss.

Indeed, if the principle is conceded, there is nothing to prevent the government making this second tax whatever it chooses. A citizen might have invested one million of dollars in tax-paid tobacco in May, 1898, and the government might in June, 1898, have imposed a tax of nine hundred thousand dollars upon it. Confiscated it under the pretense of taxing it after it had paid its tax. This is a most serious power to entrust anywhere.

The facts of this case outside of the record, however, prove it a good illustration of the oppressive nature of this power as the government claims it.

The tobacco purchased by the plaintiff in error was put up in the form of four plugs—six-inch fours, as the trade calls them—to the pound, and the plugs were to be sold by the retailers for ten cents a plug. The tax could not be added to these plugs, for it would make them sell for more than ten cents a plug, and that kills the sale, as the public insists upon having a ten-cent plug. Therefore, the plugs in all tobacco put up after the new law went into effect

were smaller than those involved in this case, but were still sold for ten cents a plug. The public will stand being imposed on to a small extent if it can get plugs for ten cents each rather than pay eleven cents for plugs that contain more tobacco. The additional tax, therefore, practically ruined the sale of the tobacco in this case. It had to be worked off in all sorts of odd ways, the retailer preferring the newly-taxed tobacco, though the plugs were smaller, because he could offer them for ten cents a plug.

It is obvious that an arbitrary power of this sort may be used in infinite ways to the injury and oppression of the citizen, and I apprehend that the court is only concerned to know that it has been exercised in an arbitrary, unjust and destructive way to set the seal of its condemnation upon that particular exercise of it.

Another view of this subject is suggested by what has already been said of excise being a tax upon consumption. Gibbon tells us of an eastern potentate who levied two taxes upon his subjects in one year. They remonstrated, saying that if he would get Allah to send them two crops in one year, they would willingly pay two taxes in one year; but that as they only gathered one crop in one year they thought they should pay only one tax in one year.

In the nature of things taxation should bear some relation to the uses men get from the thing taxed. Land may reasonably be required to pay a tax each year, because it yields a crop each year. So may bonds that yield a crop of coupons each year, and rents that come in each year. But tobacco is dead when it pays its tax, and can never yield anything but itself, and the only use man can put it to is to consume it. It is good only to be destroyed. The same is true of all other consumable articles—the subjects to which excise is applied. The court should say, therefore, that as the subjects to which excise is applied can make no yield to their owners when they are once excised, they have made

the only contribution to government that they can be called upon to make. Unless this is the true principle governing the case, the government may consume the entire subject by repeated excises imposed upon it.

## Excise Must be Reasonable.

There is another most potent reason why the construction contended for should be put upon this word "excise." The whole tendency of modern decisions is towards the proposition that any authority whatever must be exercised in a way that is REASONABLE. This subject has been so fully and so recently discussed before the court, in what is known as the Joint Traffic case, that I would not be justified in consuming the court's time by a repetition of the arguments here. I refer on this point to the briefs filed in that case.

In affirming the power of the State's Railroad Commission to regulate rates the court is careful to declare that the regulations shall be reasonable. It is only fair to assume that when the framers of the Constitution authorized Congress to impose excises they meant reasonable excises. This view is confirmed by the Constitution of 1780, adopted by the State of Massachusetts. By Article IV. of chapter 1 of that Constitution the Legislature is given authority "to impose and levy REASONABLE duties and excises." This was the view of excises entertained by the public at the time the Constitution of the United States was adopted. They were to be reasonable. It must be supposed, therefore, that when the framers of the Constitution authorized Congress to impose excises they meant reasonable excises, and it is unreasonable for Congress to impose such an excise as this plaintiff in error has been compelled to pay. The truth is, an excise is no tax at all. It is an arbitrary imposition, fixed without rhyme or reason. The framers

of the Constitution saw fit to say that Congress might impose this arbitrary burden upon the citizen, but it is not for the court to extend the authority an inch beyond the limits that the framers of the Constitution assigned to it. The view generally entertained of an excise at the time our Constitution was adopted was that it was a tax that could be made most onerous and oppressive, and was not to be tolerated unless imposed with reason and according to justice. In a debate in the Continental Congress in 1783, Mr. Wilson, of Pennsylvania, said, in describing the sources of revenue to which Congress might resort:

"An excise had been mentioned. In general, this species of taxation was tyrannical and justly obnoxious, but in certain forms had been found consistent with the policy of the freest States. In Massachusetts, a State remarkably jealous of its liberty, an excise was not only admitted before, but continued since the Revolution. The same was the case with Pennsylvania, also remarkable for its freedom. An excise, if so modified as not to offend the spirit of liberty, may be considered an object of easy and equal revenue." Madison Papers, Vol. I., page 306.

### Confiscation.

Again, the tax in this case is not taxation at all. It is confiscation. The essential idea of taxation is that all the citizens shall be required to contribute ratably from their possessions for the support of the government. Equality is of the very essence of taxation. But the authority claimed by the government is a power to confiscate. Patton had made the money by a legitimate business venture, and it was his. But the government steps in and takes it from him by force.

In one of his most celebrated judgments, Chief Justice Marshall said that the power to tax was the power to destroy, and that celebrated dictum has been as much quoted

as any that ever came from his pen. Nevertheless, I insist that it is unsound. The power to tax is not a power to destroy. It is a power to take a part with which the remainder may be preserved. Taxation may become so oppressive that an individual may be ruined by it, but that is not its objective point. It is always imposed with the idea of preserving, and not of destroying. Government undoubtedly possesses the right to destroy. If a citizen's dwelling-house is in the line of a fort's fire, government may destroy the house to send its shot to the enemy's ships. But that is a part of the power of eminent domain, not as that term is technically understood, but as it is in its nature, as growing out of the maxim *salus populi suprema lex*.

If thus it became necessary for government to destroy the citizen's property, government may undoubtedly destroy it to save the State. But it does not do it in the way of taxation. It taxes to preserve, it destroys to save the nation's life.

It is a bold as well as a dangerous thing to attack anything whatever that came from the pen of Chief Justice Marshall sitting in judgment in this sacred place. But I am emboldened to this assault because I am able to quote Chief Justice Marshall against Chief Justice Marshall. In the case of *Fletcher* v. *Peck*, 6 Cranch, Chief Justice Marshall said at page 135:

> "It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

None have been found to contest the soundness of this proposition, and it has been repeatedly affirmed in effect by this court.

*Loan Association* v. *Topeka*, 20 Wall., at page 662.

*Parkersburg* v. *Brown,* 106 U. S. 487.

*Hurtado* v. *California,* 110 U. S., at pages 536-7.

*Legal-Tender Cases,* 12 Wall.; opinion of Chase, Chief Justice, at pages 581-2.

In *Hurtado* v. *California,* 110 U. S., the court says:

"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."

I understand this principle to be canonized by the declarations of this court and the different justices of it from time to time. In the income tax case Mr. Justice Harlan said:

"If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich because of their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of *taxation,* but was repugnant to those principles of natural right upon which our free institutions rest, and therefore was legislative SPOLIATION under the guise of taxation."

In the case of *Nicol* v. *Ames,* 173 U. S., the court says at page 615:

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encoachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."

This word "spoliation" seems to have been selected advisedly.

I understand the court to mean, therefore, that whenever an act of Congress amounts to "spoliation" it will declare it void upon general principles, and as against common right.

If an act can amount to spoliation, this one certainly can. The laws had invited the plaintiff in error to buy this tax-paid tobacco upon the assurance held out to him by them that he should have whatever profits he could make by the operation, and yet, as soon as the profit is realized, under the pretence of taxation, the government comes in and confiscates the profit the plaintiff had made, and diverts it from his pocket to the government's treasury. This is "spoliation" of the most flagrant character.

UNJUST DISCRIMINATION—UNEQUAL.

So far this case has been treated as though the tax was imposed upon all the people of the United States who bought tax-paid tobacco. But such is not the fact. It is imposed upon but a small fraction of such of the people of the United States. It is imposed upon those only who bought tax-paid tobacco between April 14th, 1898, and June 13th, 1898. Smith bought tax-paid tobacco on April 13th, 1898, and he pays no further tax upon it. But Jones bought tax-paid tobacco on April 15th, 1898, exactly the same in all respects as the tobacco bought by Smith, and he must pay this additional tax upon his tobacco. This, it is submitted, is a most unequal excise—an unreasonable, unjust and outrageous discrimination against Jones. It is a discrimination, too, that if allowed would open the door to the most scandalous favoritism. The chairman of the Committee on Ways and Means might have had a friend who was given the tip to buy a great quantity of tax-paid tobacco prior to April 14th, 1898. He might have had an enemy who unfortunately bought a great quantity of tax-

paid tobacco after April 14th, 1898. This chairman gets April 14th adopted as the day to mark the dividing line, and makes his friend's fortune, and shares, perhaps, in the swag, while he gratifies his malice by ruining his unfortunate enemy. It is surely contrary to the most elementary principles on which government rests to clothe any man or any set of men with an arbitrary and irresponsible authority like this, to impose taxes upon one man that another is exempted from. The Supreme Court of Massachusetts has had a tax of this sort, claimed to be an excise, before it, and it has declared it void *ab initio* as contrary to the first principles of justice. The case is *Oliver* v. *Washington Mills*, 11 Allen 268, a little explanation of which is necessary to a proper understanding of the case.

Article 4 of section 1 of chapter 1 of the Constitution of Massachusetts provides that the Legislature shall have power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of and persons resident, and estates lying within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever brought into, produced, manufactured, or being within the same."

By an act passed in 1863 the Legislature provided as follows:

"Every corporation organized under a charter or under general statutes, paying dividends in scrip, stock or money, shall reserve from each and every dividend one-fifteenth part of that portion due and payable to its stockholders residing out of the Commonwealth, and shall pay the same as a tax or excise on such estate or commodity to the Treasurer of the Commonwealth within ten days after such dividend is declared payable."

The Washington Mills having stockholders that resided in Massachusetts and stockholders that resided out of Massachusetts, resisted payment of this tax upon their outside stockholders upon the ground that the act was unconstitutional. The first question dealt with by the court was whether the act could be sustained as imposing a proportional tax. The court had no difficulty in disposing of this question by finding that the tax was plainly not a porportional one. But as the act declared in terms that the burden imposed might be considered an excise, the court was then confronted with the question whether the tax could be sustained as an excise. It passed by the question whether a dividend on stock could be considered a commodity or production to which an excise could be applied with a strong intimation that it was not, and took up the question whether, granting that an excise could operate on a dividend, this excise could be sustained, and it held that it could not. It held that equality was of the very essence of such an imposition, and this excise was not equal because it applied to those stockholders who resided outside of Massachusetts, but did not operate upon those who resided in Massachusetts, although both sets of stockholders stood in all respects upon exactly the same footing.

The court said, page 279:

"It was declared in *Portland Bank* v. *Apthorp, ubi supra*, that taxes of this sort must undoubtedly be equal; that it must operate alike on all persons who exercise a particular employment or enjoy the same privilege or commodity. The same doctrine was affirmed in the recent case of *Commonwealth* v. *Peoples Savings Bank, ubi supra.* The reason is obvious. In the language of the court, an unequal excise would be 'contrary to the principles of justice.' That the excise in question operates unequally in this sense cannot be doubted. It is laid only on a certain class of stockholders, those residing out of the State, leav-

ing all others who enjoy the same privilege and receive a like profit or gain entirely exempt from any similar charge."

This language applies to Patton and to the act of Congress in question with as much force as it applied in the Massachusetts case. It operates on Patton, who bought his tobacco after April 14th, and exempts the man who bought exactly the same tobacco on April 13th, although both Patton and he stand in all respects upon exactly the same footing. This is not equality. It is the rankest injustice and favoritism.

If the Massachusetts court could declare that excise void as being repugnant to first principles, this court should declare this excise void also. It is unequal, and therefore unjust and repugnant to first principles. In *Portland Bank* v. *Apthorp,* 12 Allen 252, Parker, Chief Justice, speaking for the court of an excise upon a business, says:

"Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular monied capital would enquestionably be contrary to the principles of justice, and could not be supported."

The case of *Knowlton* v. *Moore,* 178 U. S. R., is not in conflict with the principle contended for here. The point of that case, as stated by Mr. Justice White, at page 55, quoting from *Magoun* v. *Illinois Sav. Co.,* 170 U. S., is that there is no natural right to a legacy, the right to it being created by positive law, and being therefore no more than a privilege conferred by law. It is no right at all then, but a privilege simply derived from the law, and to be exercised upon those conditions only that the law prescribes. Since the law confers the privilege of taking a legacy, it may prescribe the conditions upon which it is to

be received, and it may therefore provide that legacies above $10,000 shall pay a tax, while legacies below $10,000 shall pay none. That case justifies conditions upon which privileges are exercised, but it has no relation to a case in which taxes are imposed upon property already owned by the citizen.

WM. L. ROYALL,
*For Plaintiff in Error.*